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NATURAL LAW AND THE THEORY OF SOCIETY

VOLUME II

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NATURAL LAW AND THE THEORY OF SOCIETY

1500 TO 1800

BY

OTTO GIERKE

With a Lecture on

The Ideas of Natural Law and Humanity

by ERNST TROELTSCH

TRANSLATED WITH AN INTRODUCTION

BY

ERNEST BARKER

Professor of Political Science in the University of Cambridge

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GIERKE'S NOTES

§14. THE NATURAL-LAW CONCEPTION OF THE STATE

1. After the sketch given in my work on 'Johannes Althusius and the natural-law theories of the State', the only matter on which I need to go into detail here is the relation of the natural-law doctrine of the State to particular problems which are of special importance in the history of the theory of the Corporation; and for the rest I shall content myself with giving references to that work.... I have not worked through the large body of literature which has appeared since the completion of this subsection. But I may refer to the Addenda to the second and third editions of my work on Althusius for an account of my attitude to views differing from my own which have been put forward since I first wrote.

Early works on Natural Law

2. This is the case with J Oldendorp (1480–1561), *Juris naturalis, gentium et civilis isagoge*, Cologne, 1539 (*Opera*, I, pp. 1sqq.); N. Hemming (1513–1600), *De lege naturae apodeictica methodus*, Wittenberg, 1652 (also printed in Kaltenborn, II, pp 26sqq.), G. Obrecht, *De justitia et jure*, in *Selectissimae disputationes*, Strassburg, 1599, no 1, B. Winkler (1579–1648), *Principiorum juris libri V*, Leipzig, 1615 (Kaltenborn, II, pp. 45sqq.), B. Meiszner, *De legibus*, Wittenberg, 1616; John Selden (1584–1654), *De jure naturali et gentium, juxta disciplinam Ebraeorum*, London, 1640. See also Bolognetus (1539–85), *De lege, jure et aequitate*, in *Tract Univ. Jur.* I, fol. 289–324

Ecclesiastical writers on Natural Law

3. See Franciscus Victoria (Dominican, † 1546), *Relectiones tredecim*, Ingolstadt, 1580, Dominicus Soto (Dominican, 1494–1560), *De justitia et jure*, Venice, 1602 (first published 1556), F. Vasquez (1509–66), *Controversiarum illustrium aliarumque usu frequentium libri III*, Frankfort on the Main, 1572; Gregorius de Valentia (Jesuit), *Commentarii theologici*, Ingolstadt, 1592, II, *Disp.* I, Balthasar Ayala (1548–84), *De jure et officiis belli*, Antwerp, 1597; Ludovicus Molina (1535–1600), *De justitia et jure tomi VI*, Mainz, 1614 (and also in 1602), Leonhardus Lessius (Jesuit, 1554–1623), *De justitia et jure libri IV*, 3rd edition, Antwerp, 1612 (first published in 1606), Cardinal Robert Bellarmine (1542–1621), *De potestate summi pontificis in rebus temporalibus*, Cologne, 1611 (first published in 1610); Johannes de Lugo (Jesuit), *De justitia et jure*, ed. nova, Lyons, 1670.

4. F. Suarez (Jesuit, 1548–1617), *Tractatus de legibus ac Deo legislatore*, Antwerp, 1613 (first published in 1611)

5. Hugo Grotius, *De jure belli ac pacis libri tres*, 1625; the edition used by the author is that published at Amsterdam, 1702

Political writings on practical questions

6. See Machiavelli (1469–1527), *Il principe* (first published in 1515), and the whole body of literature written about and against him.

See also the numerous 'Mirrors of Princes' and cognate writings, such as: G. Lauterbeck, *Regentenbuch*, new edition, 1559, Osorius, *De Regis institutione*, Cologne, 1572, Waremund de Erenbergk (Eberhardt von Weyhe), *Aulus-politicus*, 1596; Hippolytus a Collibus, the *Princeps* (1592), and the *Consiliarius*, the *Palatinus* and the *Nobilis*, edited together, with additions, by Naurath,

Frankfort, 1670, Mambrinus Rosaeus, *Institutio principis christiani*, Strassburg, 1608, Tympe, *Aureum speculum principum*, Cologne, 1629 (first published in 1617); Georg Engelhardt von Löhneys, *Hof-, Staats- und Regierkunst*, 1622; Carolus Scribanius, *Politico-Christianus*, Münster, 1625; Ambrosius Marlianus, *Theatrum politicum*, Danzig, 1645; Saavedra Faxardo, *Idea da uno principe Cristiano*, 1649.

See also the writings on *arcana reipublicae*, such as Clapmarus (1574–1604), *De arcanis rerumpublicarum libri VI*, Jena, 1665 (first published in 1605); G. Obrecht (1547–1612), *Secreta politica*, Strassburg, 1644 (previously published in 1617) In addition, we may cite. Oldendorp, *Von Rathschlagen, wie man gute Policey und Ordnung in Stedten und Landen erhalten möge*, Rostock, 1579, Ferrarius, *De republica bene instituenda*, Basle, 1556, translated into German by Abraham Saur, Frankfort, 1601, Melchior ab Ossa, *Testamentum*, Frankfort, 1609, Zech, *Politicorum libri III*, Cologne, 1600; Gentillet, *Discours sur les moyens de bien gouverner*, 1576; Jacobus Simananca, *De republica libri IX*, 3rd edition, Antwerp, 1574, Lipsius, *Politicorum libri VI*, Antwerp, 1604, Loys de Mayerne, *La monarchie aristodémocratique*, Paris, 1611; J. a Chokier de Surlet, *Thesaurus politicorum aphorismorum*, Cologne (many editions); Jean de Marnix, *Résolutions politiques et maximes d'État*, Rouen, 1624.

Treatises on raison d'état

7. Botero, *Della ragione di stato*, Venice, 1559, Zinanus, *De ratione optime imperandi*, Frankfort, 1628; W. F ab Efferen, *Manuale politicum de ratione status*, Frankfort, 1630, Wangenbeck, *Vindiciae politicae adversus pseudopoliticos*, Dillingen, 1636. The work of Hippolithus a Lapide, *De ratione status in imperio nostro Romano-Germanico*, 1640, belongs in its general tone and treatment altogether to the purely political school, and makes the dictates of *raison d'état* superior to the requirements of Law, but in dealing with German conditions the author distinguishes sharply between (1) the analysis of the existing conditions (which is treated from a purely historico-legal point of view in Part I), and (2) political maxims (which are suggested in Parts II and III) *

8 Petrus Gregorius Tholosanus (1540–91), *De republica*, Frankfort, 1609 (first published in 1586).

Arnisaeus

9. H. Arnisaeus († 1636), *Opera omnia politica*, Strassburg, 1648. Among his writings may be specially noted: *Doctrina politica in genuinam methodum quae est Aristotelis reducta* (first published in 1606); *De jure majestatis libri III* (first published in 1610), *De auctoritate principum in populum semper inviolabili* (first published in 1611); *De republica seu relectionis politicae libri II* (first published in 1615)

10 H. Conring (1606–81), *Opera*, Brunswick, 1730, vol. III.

Works on political theory not based on Natural Law

11. See B. J Omphalus, *De civili politia libri III*, Cologne, 1565; Casus, *Sphaera civitatis*, Frankfort, 1589, Albergati, *Discorsi politici*, Venice (point by point against Bodin and for Aristotle), J. Stephanus, *Demonstrationes politicorum*, Greifswald, 1599; Melchior Junius, *Politicarum quaestionum centuria et tredecim*, Strassburg, 1631 (first published in 1602), J. Cruger, *Collegium politicum*, Giessen, 1609, H Velstenius, *Centuria quaestionum politicarum*, Wittenberg, 1610; W. Heider, *Systema philosophiae politicae*, Jena, 1628 (1610), C. Matthias,

* *Ratio status*, or *ratio administrationis*, in its original sense, is concerned with the *ratio*, in the sense of the general principles and the particular requirements, of a State and its government. This is the sense in which e.g. Althusius uses the phrase. The idea of *raison d'état* or *Staatsraison* is a later development. Cf. F. Meinecke, *Die Idee der Staatsraison in der neueren Geschichte.*

Collegium politicum, Giessen, 1611, *Systema politicum*, Giessen, 1618; C. Gneinzius, *Exercitationes politicae*, Wittenberg, 1617–18, Diodorus of Tulden († 1645), *De regimine civili libri VIII* (in *Opera*, Louvain, 1702), Aaron Alexander Olizarovius, *De politica hominum societate libri III*, Danzig, 1651.

12. J. Bodin, *De republica libri VI*, ed. 2, Frankfort, 1591 (first French edition 1577, first Latin 1584) On the epoch-making importance of his theory, see the modern works mentioned in the author's work on Althusius, p. 351 n. 2. [See also J. W. Allen, *Political Thought in the Sixteenth Century*, Part III, c. VIII.] *Bodin*

18. Among the writings of the so-called '*Monarchomachi*' there are pamphlets both on the Protestant and on the Catholic side which equally advocate the cause of popular sovereignty. *The* Monarchomachi

(*a*) On the Protestant side, the work of Hotoman (1524–90), *Francogallia*, Frankfort, 1665 (first published at Geneva, 1573), has still mainly an historical basis. In the anonymous treatise [probably written by Beza, Calvin's successor in Geneva], *De jure magistratuum in subditos et officio subditorum erga magistros*, Magdeburg, 1578 (first published in French, and stated on the title-page to have been published at Lyons, 1576), the argument from Natural Law still plays a secondary part. Natural Law is the basis of argument in the following Stephanus Junius Brutus (the real author was H. Languet (1518–81), or according to others P. Duplessis-Mornay), *Vindiciae contra Tyrannos*, Paris, 1631 (first published at Edinburgh [the real place of publication was Basle] in 1579), George Buchanan (1506–82), *De jure regni apud Scotos dialogus*, 2nd edition, Edinburgh, 1580 (first published in 1579), Lambertus Danaeus, *Politicae Christianae libri VII*, 2nd edition, Paris, 1606 (first published in 1596), John Milton (1609–74), *The Tenure of Kings and Magistrates* (1648–9), *Eiconoclastes*, *Defensio pro populo Anglicano* (1651), *Defensio secunda* (1654), in his Prose Works, London, 1848 (II, pp 2sqq., I, pp. 307sqq., 3sqq , and 216sqq.) [On the three Huguenot authors first cited by Gierke—Hotoman, Beza and Languet—see J W. Allen, *Political Thought in the Sixteenth Century*; and on the authorship of the *Vindiciae contra Tyrannos* see E Barker, in the *Cambridge Historical Journal*, 1931 and R Patry, *P. du Plessis-Mornay*, pp. 275–82]

(*b*) On the Catholic side there are the following: Marius Salamonius, *De principatu libri VI*, Paris, 1578 [originally published at Rome, in 1544, the writer seems to have been a Spaniard], Boucher, *De justa Henrici III abdicatione e Francorum regno libri IV*, Lyons, 1591; Guilielmus Rossaeus, *De justa reipublicae Christianae in reges impios et haereticos authoritate*, Antwerp, 1592 (first published in 1590, with a preface dated 1589), Mariana, *De rege et regis institutione*, Frankfort, 1611 (first published at Toledo, 1599)

New works on the *Monarchomachi* are mentioned in the author's work on Althusius (especially Treumann, Rehm, Landmann and Gooch) See also A Elkan, *Die Publizisten der Bartholomausnacht*, Heidelberg, 1905 [a work valuable for its account of Hotoman, Beza and Duplessis-Mornay], F Atger, *Essai sur l'histoire des doctrines du contrat social*, Paris, 1906, pp 100sqq. [Mention may also be made of G. Weil, *Les Théories sur le pouvoir royal en France pendant les guerres de religion*, G. de Lagarde, *L'Esprit politique de la Réforme*, A. Méaly, *Les publicistes de la Réforme*; J. N. Figgis, *From Gerson to Grotius*]

14. See G. Barclaius (1577–1608) [really 1543–1605], *De regno et regali potestate adversus Buchananum, Brutum* [i e. the author of the *Vindiciae contra Tyrannos*], *Boucherum et reliquos Monarchomachos libri VI*, Hanover, 1612 (first *Advocates of absolutism*

published in 1600); T. J F. Graswinckelius (1600–66), *De jure majestatis*, The Hague, 1642; Claudius Salmasius (1588–1653), *Defensio regia pro Carolo I rege Angliae*, Paris, 1651.

Althusius

15. Johannes Althusius (1557–1638), *Politica methodice digesta atque exemplis sacris et profanis illustrata*, 3rd edition, Herborn, 1614 (first published in 1603) [Recently reprinted, from the 3rd edition, with an introduction by C. F. Friedrich, Harvard University Press, 1932.]

Political text-books after 1600, *based on Natural Law*

16. See Otho Casmannus, *Doctrinae et vitae politicae methodicum et breve systema*, Frankfort, 1603; B. Keckermann (1571–1609), *Systema disciplinae politicae*, Hanover, 1607; J. Bornitius, *Partitionum politicarum libri IV*, Hanover, 1607, *De majestate politica*, Leipzig, 1610, *Aerarium*, Frankfort, 1612, *De rerum sufficientia in republica et civitate procuranda*, Frankfort, 1625; H. Kirchner, *Respublica*, Marburg, 1608; Z. Fridenreich, *Politicorum liber*, Strassburg, 1609; J H. Alstedius, *De statu rerumpublicarum*, Herborn, 1612, Busius, *De republica libri III*, Franeker, 1613; M. Z. Boxhornius († 1613), *Institutionum politicarum libri II*, 2nd edition, Leipzig, 1665; G. Schönborner (1579–1637), *Politicorum libri VII*, 4th edition, Frankfort, 1628 (first published in 1614: a second-hand work, based upon this, is the *De statu politico seu civili libri VI* published at Frankfort in 1617); P. H. Hoenonius (de Hoen, 1576–1640), *Disputationum politicarum liber unus*, 3rd edition, Herborn, 1615; M. Bortius, *De natura jurium majestatis et regalium*, in Arumaeus, I (1616), no. 2; König, *Acies disputationum politicarum*, Jena, 1619, Adam Contzen (Jesuit, 1573–1635), *Politicorum libri X*, Mainz, 1620, Claudius de Carnin, *Malleus tripartitus*, Antwerp, 1620, Menochius (Jesuit), *Hieropolitica*, 2nd edition, Cologne, 1626, Werdenhagen, *Universalis introductio in omnes Respublicas*, Amsterdam, 1632, C. Liebenthal, *Collegium politicum*, Marburg, 1644; N. Vernulaeus, *Diss. politicae*, Louvain, 1646; Daniel Berckringer, *Institutiones politicae sive de republica*, Utrecht, 1662.

17. The reference is to Besold's *Opus politicum*, ed. nova, Strassburg, 1626.

Hobbes

18. Thomas Hobbes (1588–1679), *Elementa philosophica de cive*, Amsterdam, 1647; *Leviathan, sive de materia, forma et potestate civitatis ecclesiasticae et civilis*, Amsterdam, 1670 [in English, under the title of *Levathan*, 1651]. On Hobbes see particularly F. Tonnies, *Thomas Hobbes der Mann und der Denker*, Leipzig, 1912. [See also A. Levi, *La Filosofia di Tommaso Hobbes*, Milan, 1929.]

19. Compare e.g. Schneidewin in *Comm. on the Institutes*, I, 2, Mynsinger, *Apotelesma* on l. 1 D. 1, 1; Rittershusius, *Instit.* I, 2, pp. 25sqq.; Ostermann, *Rationalia ad Instit.* I, 2.

20. Compare Cantiuncula, *Instit* I, 2; Vasquez, *Controv illustr.* cc 7, 10 and 54; Hunnius, *Comm. in Instit.* I, 2, *Coll. Instit Disp.* I, *Var resol. jur. civ.* I, 1, qu. 19sqq.; Binnius, *Comm. in Instit.* I, 2; Sylv. Aldobrandinus, *In primum Instit. Just librum Comm.* (Venice, 1567), J. F. Ozerius, *Comm. in libros Instit.* (Venice, 1562), pp. 37–8; Bachoven ab Echt, *Comm. in Instit* I, 2, pp. 9sqq., *Pandect.* pp. 16sqq., V. W. Forster, *Tract. Disp.* I; P. Busius, on l. 1 D. 1, 1; J Harprecht, *Instit.* I, 2; Wurmser, *Exerc.* III, qu 1; T. Schuminovius, *In I. libr. Instit. Just. catholica explicatio*, Brussels, 1663, I, 2.

21. Compare Connanus, *Comm. jur. civ.* I, cc. 1–7; Melchior Kling, *Instit.* I, 2; Vigelius, *Decisiones juris controv.* IV, no. 6; Faber, *Jurispr. Papin* I, 2, pp. 31–57, *Rationalia*, I, 1–4; A. Matthaeus, *Comm. in Instit.* I, 2; Ludwell, *Comm. in Instit.* I, 2; Schambogen, *Lect. publ. in Instit.* I, 2, qu. 1–7, G. Frantzke, *Comm. in Instit.* I, 2; Lauterbach, *Coll.* I, 1, §§ 22sqq. Compare

also Duarenus, I, 1, c 5; Cujacius, I, pp. 9sqq., VII, pp. 14sqq.; Diodorus Tuldenus, *Comm. in Instit.* I, 2, Petrus Ligneus, *Annot. ad Instit.* I, 2; H. Giphanius, *Instit.* I, 2; Cothmann, *Disp.* I, *thes.* 4–12, *Instit* I, 2, *Cod.* I, 14.

Natural Law and Jus gentium

22. More particularly, we find Ulpian's dictum about the participation of animals in Natural Law disputed, or explained as an unauthoritative mode of expression; and this leads to a rejection of the hitherto generally accepted doctrine that *jus naturale* (or *jus naturale primaevum*) is a law common to men and animals, while *jus gentium* is to be regarded as a law peculiar to men. On this basis the difference between *jus naturale* and *jus gentium* was explained simply by reference to the distinction between the 'absolute' and the 'conditioned' dictates of reason, or, again, between 'original' knowledge of the law of Reason and the knowledge which is 'acquired' in the course of historical development. See Corasius, on l. I, §2, D. I, 11; Connanus, loc. cit.; Forster, op. cit. no. 30, Bachoven von Echt, op. cit. p. 11; Ludwell, loc. cit.

23. See especially Connanus, *Comm. jur. civ.* I, c 4. Compare also Boxhorn, I, c. 2, §§3–8, c. 3, §§15sqq., and the *Commentary* of an ex-professor of Jena on the *Codex*, I, 1–13, in G. A. Struvius, *Jus sacrum Justin*, Jena, 1668, *Prooemium.*

24. See Hotoman, *Instit.* I, 2, pr., Vultejus, loc cit., Giphanius, loc cit; Forster, *Tract. Disp.* I, no. 29, Wurmser, *Exerc.* I, qu. 3 (*jus publicum ex praeceptis naturalibus, gentium et civilibus collectum est*)

The State as product of Jus gentium

25. Thinkers who maintained the theory that only a condition of universal liberty and community of property corresponded to pure Natural Law, and that government and property first came into the world through the corruption of human nature and the breach with pure Natural Law which was thereby involved, are sometimes found declaring the State itself to be a creation of *jus gentium*. see e.g Lessius, II, c. 5, *dub.* 1–3; Molina, II, d. 18, §17 and d. 20; Gryphiander, *De civili soc.* §§60sqq. But the *jus gentium* of which they spoke was for them identical with Natural Law, in the only form in which it could be applied to the real world.

Distinction of Natural and Positive Law, with jus gentium *disappearing*

26. Melchior Kling (*Instit.* I, 2, folio 1 verso) remarks in general terms that philosophers, in contradistinction to jurists, generally identify *jus naturale* with *jus gentium*. This is correct; for while Oldendorp (op. cit. *tit.* 2–4) and Hemming both use the threefold division [of natural law, *jus gentium* and positive law], the later legal philosophers generally assume as their basis a simple distinction between natural and positive law. This is the case with Winkler (II, cc 9–10), though he proceeds to divide *jus naturale* into (*a*) *jus naturale prius* (III, c. 1sq.) and (*b*) *jus naturale posterius*, i e. *gentium jus* (IV, c. 1sq), and to contrast both with *jus positivum seu civile* (V, c. 1sq) See also Beneckendorf, *Repetitio et explicatio de regulis juris*, Frankfort on the Oder, 1593, pp. 81sqq.

The ecclesiastical legal philosophers almost always start from the antithesis of *lex naturalis* and *lex positiva* But along with the former, they postulate the existence of *lex aeterna* or *divina*, which they rank as superior to or coordinate with it; and in the same way [as they distinguish two 'ideal' laws] they proceed to divide *lex positiva* into *jus humanum* [positive secular law] and *jus divinum positivum* [positive revealed law]: cf. Soto, lib. I and II; Gregorius de Valentia, qu. 3–8; Bolognetus, cc 3–7, Suarez, lib. II–IV. We find a similar view in Meiszner, lib. II–IV

Among the jurists we may note Donellus, who (I, c. 6) recognises only two

legislators—*natura seu naturalis ratio* (and God as immanent in it), and *potestas civilis*. He accordingly identifies *jus gentium* and *jus naturale*, inasmuch as all *jus gentium* is simply *natura constitutum* (§§ 4–5), and, conversely, all *jus naturale* referring to mankind manifests itself as *jus gentium* (§§ 6–9). In the same sense Vultejus remarks (*Comm. in Instit* I, 2, pp. 12–41) that the threefold division is really only a twofold division into *jus naturale* and *jus civile*—*jus gentium* being only a species of the former The same idea is expressed even more definitely by Althusius cf *Dicaeologia*, I, cc 13–14 (and more particularly, as regards *jus gentium*, c. 13, nos. 18–20) Compare Salamonius, *In libr Pand jur. civil. Commentatio*, Basle, 1530, l. 1 D. 1, 1, fol. 6sqq., Corasius on l. 1 D. 1, 1, Stryck, *Annotationes* to Lauterbach, *Coll.* 1, 1, p. 15 Political writers almost always use the simple distinction of natural and positive law.

Tendency to neglect Jus gentium

27. This [i e. neglect of *jus gentium*, even though it is allowed to be one of the forms of law] is what we find in Bodin in Book I, c. 8, no. 107 he confines the absolute obligatory force of *jus gentium* to the cases in which it is in agreement with *jus naturale*. It also appears in Soto (who never touches on *jus gentium* until he reaches Book III, c. 1), Suarez (Book II), and other ecclesiastical legal philosophers. We find it even in the writers who seek to distinguish the natural-law from the positive-law elements in *jus gentium*, such as Molina (V, d. 69), Lessius (II, c 2), and more especially Vasquez (cc 27 and 51).

Grotius (I, c. 1, §§ 10–17) definitely assumes a simple bipartite division of law. Law is either *jus naturale*, resting on the *dictamen rectae rationis*, or *jus voluntarium*, depending on legislative will, and the latter is either *humanum* or *divinum*. As for *jus gentium*, it is a species of *jus humanum voluntarium*, it is the agreement of positive law as between all or a number of peoples; the Roman conception of *jus gentium naturale* has hardly any value (§ 11), natural law and positive law are confused in the Roman *jus gentium* (II, c 8, § 26).

28. It is only in this sense that we find *jus gentium* occurring in Hobbes.

The State based on pure Natural Law

29. The ecclesiastical legal philosophers are particularly insistent in holding (1) on the one hand, that the union of men in a *vita socialis*, the institution of the original sovereignty of the community over individuals, and the devolution of authority on a secular government, are all derived from *jus naturale* and therefore from God, and cannot be changed even by the *consensus totius orbis*, and (2) on the other hand, that the various constitutional forms have their basis in *jus humanum*. Cf Soto, IV, qu 4, art 1; F. Victoria, *Rel* III, nos. 1–8, Bellarmine, *De laicis*, cc. 5–6, Rossaeus, c 1, §§ 1–3, Molina, II, *disp.* 22, 23, 26–7; Suarez, III, cc. 1–5; Claudius de Carnin, I, cc. 6 and 9–10. The same view is expressed by Arnisaeus, *Polit.* c. 2, *De rep* c 1, §§ 1–4, *De autor princ.* c. 3. The basis of the State and its authority in pure Natural Law is assumed as self-evident by most of the champions of popular sovereignty: cf Buchanan, pp 11–13, [Beza's] *De jure magistr* p. 4, qu 6, p. 75, Danaeus, I, cc 3–4; Althusius, c. 1, §§ 32–9, Milton, the *Defensio* of 1651, cc. 2–3 and 5. The absolutists are, however, no less definite in *their* appeal to divine and Natural Law: cf Graszwinkel, c 1sqq.; Salmasius, cc. 2–3 and 5–6. Further details are given in the author's work on Althusius, pp. 65–8, 72 n 41, 93 n. 48.

30. See vol. III of the author's *Das deutsche Genossenschaftsrecht*, pp. 611sqq. [translated in *The Political Theories of the Middle Age*, pp. 75sqq] and his work on Althusius, pp. 279sqq. and 365.

Natural Rights

31. In particular, this idea [of a sacrosanct sphere of natural rights] served to decide questions such as the obligatory force of constitutional laws,

the right of resistance (passive or active), and the rights of a people against a ruler who transgressed the bounds of his authority: cf. the author's work on Althusius, pp. 305 sqq. 365 n 95

32. We find legal philosophers and political writers energetically developing and applying the old theories, (1) that Natural Law, as the *dictamen rectae rationis*, was unalterable by any human power and even by God Himself, (2) that all positive law was derived from it, and could only add to or take away from it when place and time might require, and (3) that an enactment contrary to Natural Law was entirely null and void, and, per contra, an enactment was the more perfect, the more nearly it approached the Law of Nature. Cf. e.g. Soto, I, qu. 4; Vasquez, c. 27; Gregorius de Valentia, II, d. 1, qu. 4, Bolognetus, c 7; Molina, V, d. 68; Winkler, II, cc 9–10, V, c. 1 sq., [Beza's] *De jure magistr.* sect. 4, qu. 2–3, Beneckendorf, op cit. pp. 81 sqq.; Vultejus, *Instit.* I, 2, pp. 37–44; Bodin, I, c. 8, no 107 and II, c. 2; Althusius, *Dicaeologia*, I, c. 13, no 9 sqq. and c. 14, *Polit* Praef and c. 128 [? c. XXXVIII], §§ 128–9. *Natural Law as a political standard*

Many writers (e g Hotoman, *Instit* I, c. 2, pr.; Bachoven, *Instit* I, 2, § 1; and Winkler, V, c. 1) divided *jus civile* into *mixtum* and *merum*, according as Natural Law was or was not included in it; but others contested even the bare possibility of a purely positive law: cf Althusius, *Dicaeologia*, I, c. 14 (a law completely agreeing with Natural Law would not be *civile*, but a law with no element of Natural Law would not be *jus* at all), Ludwell, *Instit.* I, 2, § 1.

33 Vultejus (*Instit* I, 2, § 11, p. 41 no. 6) expresses this idea in a particularly definite way *jus naturale est in seipso in recta ratione firmum et immutabile... iterum est immutabile in totum, a quo interdum paulatim recedituv, ut ad ipsum redeundi via sit commodior, ne, si directe ad ipsum eatur, ad ipsum non perveniatur.*

34. See the author's work on Althusius, pp 63 sqq and 338.

35 Bodin, I, c 1, no. 1, gives the definition, *Respublica est familiarum rerumque inter ipsas communium summa potestate ac ratione moderata multitudo.* The definition of Gregorius (I, 1, § 6) is more detailed: *Respublica est rerum et vitae quaedam communitas unius societatis, quae efficit unum quoddam corpus civile ex pluribus diversis ut membris compositum, sub una potestate suprema veluti sub uno capite et uno spiritu, ad bene et commodius vivendum in hac mortali vita, utque facilis ad aeternam perveniatur* Cf also Althusius, *Polit.* c 9, Hoenonius, I, § 3; Kirchner, I, § 3; Keckermann, *Praecogn* p. 7; Konig, *Theatrum pol.* I, c 1; Winkler, V, c 4, Suarez, III, c 1, Grotius, II, c. 9, § 3, cf I, c. 3, §§ 4–6, II, c. 15, § 3, III, c. 20, §§ 2–4, Berckringer, I, c 4; Boxhorn, I, c. 2, § 1 Respublica and Civitas

Often a distinction is drawn between *Civitas* and *Respublica*, which are said to be related as *materia* and *forma*, or as *subjectum* and *finis*, or as body and soul. The *Civitas* thus becomes merely the group or community which is the basis of the State, while the *Respublica* is the constitution of that group; and on this basis the *Civitas* is defined as a body of persons, and the *Respublica* as an order of relations (an *ordo jubendi ac parendi*, or some such phrase)—the idea of *societas* being then connected with the former, and that of *summa potestas* with the latter. The distinction is particularly emphasised in Arnisaeus, *Polit.* cc. 6 and 7, *De rep.* I prooem. §§ 4 sqq., I, c. 5, s. 3, II, c. 1, s. 1; see also Besold, *Princ. et finis pol doctr.* Diss. I, c. 5, §§ 1–3 and c. 8; Knipschildt, *De Civ. imp.* I, c. 1; Schönborner, I, c. 4, Werdenhagen, II, cc. 1 and 3; Berckringer, cc. 1 and 4.

36. Althusius expressly makes the chief task of politics consist in the

n of the nature and authority of *majestas*; cf. his prefaces (in the author's work on Althusius, pp. 18–20).

Sovereignty

37 On the history of the conception of sovereignty see the author's work on Althusius, Part II, c. V and pp. 351sq., with the works there cited by Hancke, Weill, Dunning, Dock, Merriam, Rehm and Jellinek; and also Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften* (Berlin, 1889), pp. 106sqq. [See also the exhaustive analysis of the conception in de la Bigne de Villeneuve, *Traité général de l'État*, vol. I.]

38. References for all these points may be found in the author's work on Althusius, pp. 151–8, 163–78 and 351sqq. [Gierke also refers to the notes on pp. 213–15, 218–19 and 220–3 of the fourth volume of his *Genossenschaftsrecht*, in a section not here translated.]

39. See the author's work on Althusius, pp 143sqq.

Classification of States

40. The classification of forms of the State of course assumed a far greater importance when the Ruler was the 'Subject' or owner of Sovereignty than when he only *exercised* a sovereignty which always and everywhere belonged to the People; and indeed a strict interpretation of popular sovereignty reduced the classification of forms of the State into a mere classification of forms of government. Althusius was the first to express this consequence definitely; and he deals with classification only at the end of his *Politica* (c. 39), in expounding a theory of the *species summi magistratus* see the author's work on Althusius, p. 35; and see also Buchanan, p. 20, and Milton, *The Tenure of Kings and Magistrates*.

The mixed Constitution: opponents and advocates

41. This explains why we find opponents of the conception of the *forma mixta* not only among (1) the advocates of the sovereignty of the Ruler, but also among (2) the devotees of popular sovereignty and (3) those of 'double sovereignty'. The opponents of the first kind are e g. Bodin, II, c. I, nos 174–8, c. 7, no. 234; Gregorius, V, c. I, §3; Barclay, V, c. 12; Bornitius, *Part.* pp. 46sqq. and 102sqq.; Reinkingk, I, cl 2, c. 2, nos 231sqq. and cl. 5, c 6; Graszwinkel, c. 6, Hobbes, *De cive*, c 7, *Leviathan*, c. 19. The opponents of the second kind are Althusius, c. 39; Hoenonius, II, §42. Opponents of the third kind are Kirchner, III, §7, litt. e, Alsted, pp 69sqq., Arumaeus, I, no. I, Otto, *Diss. an mixtus detur reipublicae status*, in Arumaeus, II, no. 22; Brautlacht, III, c 2, §10; Cubach, Beindorff, Hilliger, Konings, Schieferer. [Gierke also refers to a note on p 219 of the fourth volume of the *Genossenschaftsrecht*, in a section not here translated.] Conversely, the mixed form receives the adhesion not only (1) of some of the advocates of popular sovereignty (such as Hotoman, *Francogallia*, c. 12, and Danaeus, I, c. 6), and (2) of advocates of 'double sovereignty' (e.g Besold, *De statu reip. mixtae*, c. 2, Frantzken, *De statu reip. mixtae*, in Arumaeus, III, no. 27 and IV, no 41, §§60sqq.; Tulden, II, cc 16–17, Berckringer, I, c. 12, §§15–21; Werdenhagen, II, c. 25; Liebenthal, d. VIII, qu. I; Paurmeister; Limnaeus, Carpzov) [Gierke also refers to pp. 218sqq. of the fourth volume of the *Genossenschaftsrecht*, in a section not here translated]; but also (3) of many of the advocates of the sovereignty of the Ruler. Examples of this last class are Molina, II, *disp.* 23; Suarez, III, c. 4, no. 5 and c. 19, no. 6, IV, c. 17, no. 4, Albergati, I, cc. 8sqq., pp. 251sqq.; Arnisaeus, *Polit.* c. 8, *De jure maj.* II, cc. I and 6, *De rep.* II, c. 6, s I and s. 5 §§1–134, II, c. I, §1, *De auct.* c. I, §§4sqq., Busius, II, c. 6, Knipschildt, I, c. 8, nos. 61–3; Keckermann, II, cc. 4–6; Heider, pp. 982sqq ; Schonborner, I, c. 16; Felwinger, *Diss.* pp. 147–84 [a reference is also added to other writers cited in a note on

p. 222 of the fourth volume of the *Genossenschaftsrecht*]. A similar view occurs in Grotius, I, c. 3, §§17–20, c. 4, §13.

It should be added, however, that the conception of the mixed constitution has obviously a different significance, according as the right of the Ruler which is held to be divisible among a number of different 'Subjects' is regarded as (*a*) the one and only form of Sovereignty, or (*b*) merely a *majestas personalis*, or (*c*) a simple 'magistracy'.

The absolutist view of democracy, as equally absolute with monarchy

42. Cf. Bodin, II, c. 1, F. Victoria, *Rel.* III, no. 10 (there is the same *potestas* and the same *libertas* in every form of State, whether *unus* or *plures* be the 'Subject' of sovereignty); Graszwinkel, c 11 (whether the ruling authority be *persona unum* or *corpore unum*,* the same theory is applicable in regard to *imperium* and *obedientia*, and their *origo a Deo*); Arnisaeus, *Polit* c 11, *De jure maj.* I, c. 2, *De rep.* II, c. 7, s. 2; Claudius de Carnin, I, c. 10; Hobbes, *De cive*, c. 7, §§7 and 9, c. 10, *Leviathan*, cc. 18–19.

Those who maintained, in regard to monarchy, the principle that the king was superior not only to all the members of the community as individuals, but also to the community itself as a whole, were logically compelled to admit the corresponding principle in regard to democracy—that the governing community of the People was superior not only to individuals, but also to the whole body of the governed In doing so, they allowed the conception of the sovereign Whole to transform itself into that of the majority [i.e. they regarded the majority, rather than the whole community of the people, as superior to the body of the governed]; but failure to analyse their conceptions adequately enabled them to avoid the paradoxical conclusion, which this involved, that the majority had a greater authority than all the members taken together. Thus we find Bodin saying of the *popularis status* (II, c. 7), *Cives universi, aut maxima pars civium*, caeteris omnibus *non tantum singulatim, sed etiam simul coacervatis et collectis, imperandi jus habent.* Other thinkers, in dealing with democracy, tacitly dropped the distinction between the sovereign community and the whole body of the governed [or, as Rousseau expressed it, between the people as *souverain* and the people as *état*], and simply spoke of the authority of the *populus universus* over *omnes ut singuli*. Bornitius (*Part.* p. 51) expressly remarks that in a democracy the sovereign *cives, collective uniti*, only govern *singuli*, for *cunctis non possunt* [*imperare*]. Hobbes was the first thinker who was able, without self-contradiction, to reject the view that in a democracy there was a personality of the people [as a governed body] which was distinct from the collective person of the people as Ruler, and he was able to do so because, in *every* form of State, he regarded the people as being, in relation to the Ruler, a mere sum of 'dissolute' individuals (cf. *De cive*, c. 6, §§13 and 17, c 7, §§5–7, c. 12, §8, *Leviathan*, c. 18).

The problem of the People as Ruler and the People as ruled

43. Thus Besold (*De maj* s 1, c. 1, §5) ascribes to the popular assembly in a democracy, acting by majority-vote, only a *majestas personalis*, while he assigns to the community of the citizens a *majestas realis*, and he consequently draws the conclusion that unanimity is required for constitutional changes and for any regulations which relate to the State itself. Diodorus of Tulden (I, cc. 11 and 12) takes the same line. The advocates of a 'double sovereignty', who distinguished between *majestas realis* and *personalis* even in treating of democracy, were theoretically bound to assume two different forms of the

* *Persona unum* = one in the sense of possessing a single legal personality (though several physical persons may unite to constitute that single personality). *corpore unum* = one in the sense of being a single physical person.

sovereign community of the People. Similarly, too, in the pure theory of popular sovereignty, the sovereign People [which is ultimately supreme in *all* forms of State] cannot be logically identified with the People which is instituted as the Ruling authority in a democracy. Even the advocates of the sovereignty of the Ruler, if they pushed the doctrine of a contract of submission [i.e. of a contract of government] to its logical conclusion, were bound to distinguish, as the two separate parties involved in this contract when a democracy was in question, (1) the originally sovereign People, and (2) the sovereign popular assembly deciding by majority-vote [to which the originally sovereign People had submitted itself by contract]: cf. Victoria, III, nos. 1, 6–8, Soto, IV, qu. 1, a 1, Molina, II, d. 23, § 12, Fridenreich, c. 18.

It was impossible, however, to take these distinctions seriously without being involved in contradictions. Thinkers began by arguing, where other forms of State than democracy were concerned, that both the original rights of the People and those of its rights which still remained in action after the institution of the Ruler belonged to the same assembly—the assembly of all the members of the State—deciding as a *universitas* by majority-vote. Then, as soon as democracy was in question, they made a sudden *volte-face*, and required unanimity [I.e. they claimed that the sovereign People, when exercising its original rights, must be unanimous, though they allowed that the popular assembly, when exercising the rights which it acquired by being instituted as Ruler, might decide by majority-vote] This was an entirely arbitrary procedure; and yet without it the distinction of the two forms of the popular community remained without any practical significance. Many thinkers, accordingly, dropped any idea of a contract of submission [between the sovereign People and the popular assembly] in dealing with democracy, and substituted for it a special resolution of the sovereign People to retain its sovereignty this is the line taken by Suarez, III, c 4, nos. 1, 5–6, 11 Others, again, substituted [in lieu of a contract between the sovereign People and the popular assembly] a contract between the People and the governing body of the Republic, thereby abolishing any clear logical distinction between a Monarchy and a Republic This is the line taken by Althusius (c 39) while describing the People as itself the *summus magistratus* in a democracy, he nevertheless assumes a contractual relation between the People and its officials and ephors, cf Rossaeus, c. 1, §2, and Milton, *Defensio* of 1651, c 6. The majority of thinkers were altogether silent on this difficult question. Hobbes, however (loc. cit.), saw clearly this weak spot in the armour of the doctrine of popular rights, and he used the inherent self-contradiction of the view that in a democracy the People must be superior to the People in order to refute entirely the idea that a popular community, as distinct from its Ruler, could have any sovereignty at all, whether in the way of original rights or of rights that still remained in action after the Ruler's institution.

44. See the author's work on Althusius, pp. 143sqq. and 356.

45. Op. cit. pp. 85, 91 and 341.

Monarchy and Republic as the two types

46. In this connection the three basic forms of government distinguished by Aristotle [the One, the Few and the Many] continued to be generally recognised; but there was an increasing tendency to unite with Aristotle's threefold division a logical distinction of governments into the *two* forms of Monarchy and the Republic—aristocracy and democracy being then taken together as forms of State with a collective government [i.e. government by

more than One]. Cf. Althusius, c. 39, Victoria, *Rel.* III, no. 10 (*unus vel plures*); Bornitius, *Part.* p. 45 (*majestas inest uni semper τῷ λόγῳ, interdum etiam persona, interdum multis**), Keckermann, *Polit* II, c. 1, Arnisaeus, *De jure maj.* I, c. 2, *Polit* c. 11 (the sovereign is *unum* either *natura*, or *conspiratione et analogia*); Grotius, I, c. 3, §7 (*persona una pluresve*), Busius, I, c 3, §4 (*unus vel plures*); Berckringer, I, c. 4, § 10 (*unum numero vel analogia*), Graszwinkel, c. 11 (*persona unum* or *corpore unum*), Hobbes, *De cive*, c. 5, §7 and c. 7, *Leviathan*, c. 17 (*unus homo vel coetus*). Althusius, Bornitius, Keckermann, Besold (*De Arist.* c. 1), Tulden (II, c 12) and other writers use the technical expressions 'Monarchy' and 'Polyarchy'.

Mixed and limited constitutions

47. The believers in a mixed constitution regarded a division of the right of government as possible; and conversely the indivisibility of governing authority served their opponents as the chief ground for rejecting such a form of State. Both allowed that other 'Subjects' (and, more particularly, assemblies of the Estates in a monarchy) might participate to some degree in the exercise of the right of government. But believers in the mixed constitution—assuming that States in which the right of government was constitutionally limited could co-exist with absolute States—asserted the possibility of an *independent* right to participate in the exercise of State-authority, while their opponents—refusing to allow any binding force to a constitutional limitation of the Ruler—treated any modification of governing authority by the co-operation of other factors as only a variation *within* the mode of government (*ratio gubernandi* or *forma gubernandi*)

Most of the advocates of the mixed form (cf supra, n 41) recognised in addition the merely 'limited' form of government (e.g Molina, II, d. 23, Suarez, III, c. 4, no. 5, c. 9, no. 4, IV, c. 17, no 4, Keckermann, I, c 33, II, cc. 4–6, Heider, pp 982 sqq., Busius, II, cc 6–7, Grotius, I, c 3, §§ 16–18), but there were some of them who thought that while division of sovereignty was conceivable, limitation was not (Arnisaeus, *De jure maj* I, c 6, *De rep* II, c 2, s. 5). Even the opponents of the mixed constitution (supra, n 41) —not only those who advocate popular sovereignty and 'double sovereignty', but also many of those who advocate the sovereignty of the Ruler—are willing to accept the idea of limited government, and to defend, in so many words, the inviolability of constitutional limitations on the right of the Ruler (Bornitius, *Part.* 43, *De maj* c. 13, Fridenreich, cc. 18 and 29). On the other hand the thorough-going absolutists reject the limited form no less than the mixed (Bodin, I, c 8, nos 85–99, Gregorius, I, c 1, §9, XXIV, c. 7; Barclay, Graszwinkel, cc. 3, 4, 6, 11, Hobbes, Salmasius, c. 7)

48. Cf. the author's *Althusius*, pp. 80 sqq and 341 The fact that Arnisaeus (op. cit p 81 n 19) and Grotius (op cit n. 20) recognise other grounds [in addition to delegation by the people] for the acquisition of the rights of government, or again that Graszwinkel (c. 2) rejects the contract of government altogether, hardly weighs in the balance against the general trend of Contractarian theory.

49. Op. cit. p. 85, n. 30.

50. Op. cit. p. 85 n. 32.

The People identical through the generations of its life

51. The identity of the people as it now stands with the people as it originally existed was used to explain why a contract of government assigned to a primitive past was obligatory upon the present generation. In defence

* "The 'Subject' of Sovereignty is always theoretically one, sometimes it may also actually be one person, but sometimes it may be composed of many."

of this identity we find an appeal expressly made to the principles of the [Roman-law] theory of Corporations in regard to the continuous existence of the *universitas* through all the changes of its members. cf. especially Junius Brutus [the author of the *Vindiciae contra Tyrannos*], qu. III, pp. 171 sqq.; but cf also Althusius, c. 19, §§ 74 sqq., c. 9, § 16, c. 38, §§ 65 sqq , and Victoria, *Rel.* III, no. 11. Grotius uses the same idea (II, c. 5, § 31), extending it to cover cases of the forfeiture of *imperium* by delict or in war—*quia successio partium non impedit quominus unus sit populus*; cf. also III, c. 9, § 9.

The People as a Corporate Body

52. According to the *Vindiciae contra Tyrannos* the people, as a *universitas* which *unius personae vicem sustinet*, (1) acting in conjunction with the King, concludes a covenant with God (qu. II, p. 75), and (2) acting by itself, concludes a covenant with the King (qu III, pp. 131 sqq. and 248 sqq.). Now since *universitas nunquam moritur*, and no prescription runs against it (qu. III, pp. 170–1), the people continues to possess inviolable rights and duties in virtue of both these covenants. (1) It is responsible to God, as *correus debendi* [or joint debtor] with the King, for the well-being of the Church, and it makes itself liable to divine punishment by tolerating godless magistrates, while according to the rule *quod universitas debet, singuli non debent*, the *primates* of the people *ex foedere cum Deo non tenentur* (qu. II, pp. 76, 84 sqq. and 115). (2) Again, in regard to the King, the people, as a *universitas*, has a higher authority, and in the event of his becoming a tyrant it has the right and duty of resistance and deposition (qu. III, pp. 143 sqq. and 292 sqq), while *singuli privati* are in no way called upon to take such action (ibid. pp. 319 sqq.).

Althusius brings the popular community, as a *consociatio publica universalis*, entirely under the category of the *universitas* (*Polit* c. 9 sq.). He ascribes to this *corpus consociatum*—the *totum corpus consociationis*, or *universitas populi*—inalienable sovereignty, the ownership of State-property, and the rights belonging to an employer in regard to all officers vested with public powers of administration, while, citing in justification the [Roman-law] theory of corporations, he excludes individuals from the enjoyment of all these rights (Praef pp. 9, 17, 18, 19, 38) See also Buchanan, pp. 16 sqq and 78; Hotoman, *Francogallia*, cc. 6–9 and 19; Rossaeus, c. 1, §§ 2–3, Mariana, I, c 8, Marius Salamonius, *De princ* I, pp. 19–20

53. See, for example, Paurmeister, I, c. 17, Bortius, c. 6, § 2; Besold, *De maj.* sect 1, c. 1, § 4 (*corpus*) and § 7 (*penes universitatem populi*); Limnaeus, *Cap. imp.* p. 352

The use of the theory of Corporations in Grotius

54 Grotius employs the conception of the *universitas* and the principles of the [Roman-law] theory of corporations (1) in dealing with the contractual devolution or transference of supreme authority by the people (I, c. 3, § 13; II, c. 5, § 31, c. 14, §§ 2 and 10; III, c. 8), (2) in his account of delicts of the people and its responsibility for the delicts of its members (II, c. 21), (3) in regard to the question of the obligation of the people by the acts of the king (II, c. 14, § 10), (4) in justifying reprisals under international law (III, c. 2) and the taking of prizes (III, c. 6, § 8), and also in other respects

And in ecclesiastical writers

55. See Victoria, III, no. 8, Vasquez, c. 47; Soto, IV, qu. 4, a. 1–2 (the people as *corpus*), Molina, II, *disp.* 23, Suarez, III, cc. 2–3 (the people as *communitas, corpus mysticum, corpus politicum*, originally possesses and transfers the supreme authority). See also Pruckmann, pp 90 sqq. (contract with the *universitas* or *communitas*), p. 111, nos. 25 sqq ; Boxhorn, I, c 2, § 1 (*corpus multorum*); Busius, I, c 3, § 3 (*universitas cujuscunque totius legitimae civitatis uno imperio contentae*).

56. See Bodin, I, c. 8, nos. 85–99, Gregorius, I, 1, §§6–7 (*unum corpus civile* according to l. 30, D. 41, 3 and l 1, § 1, D 3, 4); Knipschildt, V, c. 1, nos. 3–4

57. The people united in a State is described as a *societas civilis*, naturally developed by the extension and perfection of the Family, in the following writers: Gregorius, I, c 1, §6 and c 2, §§1–6 (*societas, quae natura coaluit*), XIX, c. un ; Arnisaeus, *De rep.* I, c 5, s. 4 and s 5, *Polit.* c 6 (the *civitas* is a *societas*, the *civis* is a *socius*), Besold, *Diss.* I, c. 3 (*societas civilis*, which *in utero naturae concepta, in ejus gremio nutrita est*), Kirchner, *Disp* I, § 3 (*societas populi, legitimo civilis potestatis imperio coalita*); Keckermann, pp. 12 sqq , Fridenreich, c. 2 (growth from *consociationes domesticae*, like a many-branched tree from its roots) and c 10; Schonborner, I, c 4, Cruger, *Disp.* I, Heider, pp. 25 sqq , Werdenhagen, II, cc. 1–3 (the *populus* is a *societas civilis*); Tulden, I, c. 5 (*societas civilis*, which arose *ex naturae instructu*), and c. 6 (the *finis reipublicae* is *societatis civilis tutela atque cultura*), Conring (*societas civilis*, with *imperium*), Knipschildt, I, cc. 1 and 6, and many other writers. *The People described as a* societas

A *societas civilis* founded by a union of men originally living in isolation is the basis adopted by Buchanan, pp. 11 sqq , Mariana, I, c 1, Rossaeus, c 1, § 1, Boucher, cc 10 sqq., Hoenonius, I, §§4 sqq., Winkler, I, c. 10, II, cc 9–10, V, c. 3 (*multitudo sese consociat*, and thus produces *societas civilis*), cf. the description of the State as *societas civilis et voluntaria* in Velstenius, *dec* 2–5, and in Matthias, *Coll. disp.* 4–5 and *Syst* pp. 20 sqq The treatment of the community of the people as a contractually created 'society' is carried into greater detail by Salamonius, I, pp 35 sqq. and 38–42, and by Paurmeister, I, c 17, nos. 3 sqq. (the *societas* formed by *mutua conventio*), c. 3, no. 10 (*societas et libera conventio*), c 30, nos. 1–3 (the ending of such *societas* by *contraria voluntas*).

Althusius, who is the first to develop a formal theory of the social contract as constituting the State, interprets the State throughout (like all other corporate bodies) as a *consociatio* or *societas* (*Polit* cc. 1–9, *Dicaeolog* I, cc. 8, 32, 78 and 81) Grotius constantly applies the conception of *consociatio* or *societas* to the political community (*Proleg.* cc. 15–16, I, c 1, § 14, II, c. 5, §§17, 23, 24, II, c 6, §§24 sqq., III, c. 2, §6, c 20, §§7–8).

58 Cf. the author's *Althusius*, p. 94 n 51, p 96 n. 59, p 98 n. 63, p. 100 n 68 Schonborner, I, c 4, definitely says, *Essentia reipublicae est in personis vel imperantibus vel obtemperantibus, sibi invicem mutuis officiis obstrictis.*

59. Cf the author's *Althusius*, pp. 96 sqq

60. Thus, according to Molina (II, d 22, §§8–9), *societas politica* arises from the union of originally independent individuals, but because the natural reason given by God impels them thereto, there results *eo ipso, quod homines ad integrandum unum corpus Reipublicae conveniunt, jure naturali, et sic a Deo immediate, potestas corporis totius Reipublicae in singulas partes, ad eas gubernandum, ad leges illis ferendum jusque illis dicendum, et ad eas puniendum* The *homines convenientes*, because they are *partes*, are a *conditio sine qua non* of the authority thus resulting, but they are not its creators otherwise it would be impossible to explain why the community has a right of life and death, while no individual has such a right over himself Moreover, *longe diversa fit potestas, quae ex natura rei consurgit in Republica, a collectione particularium potestatum singulorum*, and a *Respublica* does not hold its power *auctoritate singulorum, sed immediate a Deo.** *The theory of the Rights of the People in the theologians*

* The theory of the theologians may be illustrated from the analogy of marriage The agreement of husband and wife is necessary to the existence of marriage But

Suarez (III, cc. 1–3) argues still more emphatically that, inasmuch as man is born free and subject to no human power, the *perfecta communitas* only arises in consequence of the *interventus humanae voluntatis*, and indeed *per voluntatem omnium qui in illa convenerunt*, but at the same time, man being by nature *subjectibilis*, this agreement of union corresponds in his case to the demands of natural reason. Moreover, although the community itself *coalescit medio consensu et voluntate singulorum*, the *authority* which it possesses is not acquired directly from the *singuli*, who did not previously possess any such power, and least of all any right of life and death, nor is such authority acquired directly from God; it is derived *ex vi rationis naturalis*, as a *proprietas consequens naturae* which God has willed, and therefore it follows that individuals, though they are creators of the *corpus politicum*, are not the source of the authority of that body over itself and its members.

See also Didacus Covarruvias, *Pract. qu.* 1, cc. 1 and 4 (*societas civilis* is formed *lege naturali*, and by the same law it possesses all authority, which it proceeds to devolve upon a ruler) Soto, I, qu. 1, a 3 and IV, qu 4, a. 1–2 (God, *per legem naturalem*, gave individuals a right of self-preservation, and with it—because self-preservation is impossible in isolation—an instinct for society, and thus He gave the *congregata Respublica* authority over itself and its members), Victoria, III, nos. 4–8, Bellarmine, *De laicis*, cc 5–6, Claudius de Carnin, I, c. 9.

Suarez on the origin of sovereignty

61. Suarez (III, c. 3, nos 6–7) compares the sovereignty of the *corpus politicum et mysticum* with the liberty of the individual person In both cases there is an authority over the self and its own members—an authority which is necessarily given with and by the fact of existence Now as the child receives its existence from its father, but its liberty from God, in virtue of Natural Law, *ita haec potestas datur communitati hominum ab auctore naturae, non tamen sine interventu voluntatum et consensuum hominum, ex quibus talis communitas perfecta congregata est.* As the father can beget or not beget the child, but if he begets it can only beget it as a free being, so it only needs a human will directed to that end to bring the community into existence, but *ut illa communitas habeat potestatem praedictam, non est necessaria specialis voluntas hominum, sed ex natura rei consequitur et ex providentia auctoris naturae* Just because they are not inherent in the nature of either, the sovereignty of the community and the liberty of the individual are both alike alienable and transferable. See the author's *Althusius*, p. 67.

The theologians really make the community an aggregate of individuals

62. Such a view is already implied in the argument, that sovereignty must originally belong to the community because there is no discoverable reason why it should belong to one person rather than another. cf Victoria, op. cit no 7, Bellarmine, op cit , Molina, d. 22, Suarez, III, c 2, nos 1–4 But it appears more explicitly in the further conception, that the community is driven by the nature of things to transfer its original authority to a ruler because it cannot, as a *multitudo*, exercise that authority itself cf Victoria, op. cit. no 8, Bellarmine, op cit. (where it is definitely said that supreme authority *immediate tanquam in subjecto in tota multitudine est*, but is transferred by this *multitudo*). Soto argues in the same sense, IV, qu 1, a 1.

A similar line is adopted by Molina (II, c 23). While describing the sove-

it does not explain, or create, the institution of marriage. The institution is an inherent part of the divine scheme, and the agreement of the parties is simply an agreement to fit themselves into that scheme, which exists *per se* apart from their agreement.

reignty of the people as the authority of a *body* over its members, he none the less takes the *totum corpus* to be the [mere] sum of all, and he depicts the transference of authority to a Ruler as a command of Natural Law, inasmuch as otherwise [i.e if the transference were not made] all would be constantly obliged to act in unison and by unanimity.

Even Suarez, in spite of the emphasis which he attaches to the corporate nature of the unity of the people, cannot transcend the conception of that unity as a mere collection of all its members. He describes the *hominum collectio* (III, c. 2, no 3), or the *tota communitas* (ibid. no. 4), as the original 'Subject' of supreme authority, and he contents himself with adding that *multitudo hominum dupliciter considerari potest* (1) *uno modo, ut est aggregatum quoddam sine ullo ordine vel unione physica vel morali* , (2) *alio modo, quatenus speciali voluntate seu communi consensu in unum corpus politicum congregantur uno societatis vinculo et ut mutuo se juvent in ordine ad unum finem politicum, quo modo efficiunt unum corpus mysticum, quod moraliter dici potest per se unum* He argues that it is only in this second mode or sense that the community is the 'Subject' of a *communis potestas, cui singuli de communitate parere tenentur*, in the first sense or mode it only possesses such authority, at the most, *radicaliter* (III, c. 2, no. 4, cf II, c 3, nos. 1 and 6—*rudis collectio sive aggregatum* as distinct from *corpus mysticum*).*

The authority of the State as a sum of individual rights

63. In Buchanan (pp 11sqq.), Mariana (I, c 1), Rossaeus (c 1, §1), Boucher (cc 10sqq) and Paurmeister (I, c 17, nos 3sqq), the authority of the State is regarded as proceeding merely from the social union of free and equal individuals who originally lived in isolation. Althusius (*Polit.* cc. 1sqq.) ascribes the rights of all associations to a *communicatio mutua* in things, services and rights which are useful and necessary for social life Grotius (II, c. 5, §§ 17sqq and c. 20, III, c. 2, §6) derives the rights of the State, including the power of punishment, entirely from the original rights of individuals. Milton (*The Tenure*, pp 8–10) considers the authority of the State as the product of a contract of society formed among men who are naturally born free, 'this authority and power of self-defence and preservation being originally and naturally in every one of them, and unitedly in them all'. See the author's work on Althusius, pp 105sqq , 344sqq.

Salamonius on the State as a sum of contractual obligations

64 A typical example of this conception is the way in which Salamonius (pp. 33–42) attempts to prove that *populus ipse suis legibus ligatur*, although nobody can be *imperans* and *obediens* at the same time, and nobody can be *seipso potentior*. In reality, he argues, each law is a contract, and the people is a contractually united body of persons. The very beginning of the *civitas*, as a *civilis societas*, already implies binding contracts, and therefore laws. It is all a question, not of the obligation of the people to itself, but of mutual obligation between the individual members of the people—*societas non sibi obligatur, sed ipsi inter se socii*; and the Ruler, who occupies the position of *praepositus* or *institor* in the *societas*, is no less bound than the other members. Cf. Milton's phrase (op. cit. p. 8), 'a common league to bind each other from mutual injury'.

* Here again (cf the translator's note appended to note 60), the theory of the theologians seems really to be higher than Gierke allows The consenting parties who are necessary to the existence of a political society (just as they are necessary to the institution of marriage) may be, as such, only an aggregate. But the *institution* which emerges from their act of agreement as a number of individuals is a part of the divine scheme, and is a true 'mystical body' in that scheme. The distinction is fundamental, and if we accept it the State is really a *corpus*.

Althusius on the State as a partnership

65. Althusius identifies the body politic (*corpus symbioticum*) with the contractual community of the members of the people (*communio symbiotica universalis*): he bases all the rights of governing authority on the obligation, incurred in and by the contract of society, to participate in a *communicatio* of material and spiritual benefits and means of action; and he ascribes to the government only the position of 'administrator' of such matters as are the objects of this *communicatio*. Cf. *Polit.* cc. 9sqq.; *Dicaeologia*, I, c. 81; and the author's work on Althusius, pp. 21sqq.

The State in Grotius partly a Corporation partly a partnership

66. Cf. Grotius (II, c 5, §23): *consociatio, qua multi patresfamilias in unum populum ac civitatem coeunt, maximum dat jus corpori in partes, quia haec perfectissima est societas, neque ulla est actio hominis externa, quae non ad hanc societatem aut per se spectet aut ex circumstantiis spectare possit* In §24 he argues that the individual is entitled by Natural Law to terminate his membership [of the State]; but just as in the *societas privata* of Roman law a member cannot quit if his leaving affects the society, so here he can only quit on condition of paying in ready money his share of any debt with which the State may be burdened, or of providing an *idoneus* in lieu of himself if the State be engaged in war: moreover departure is often forbidden by positive law, and a *pactum sic initum* is valid. In III, c 20, §§7–8, he argues that it follows from the act of consent, implied in entry into civil society, that *res singulorum* may be sacrificed for the sake of *publica utilitas* in the event of the conclusion of a peace-treaty, but it equally follows, he adds, that individuals have a claim to compensation for war-losses from the means at the disposal of the community. The reason is that, though the infliction of injury and loss on an external enemy is lawful in war, *cives inter se sunt socii, et aequum est ut communia habeant damna quae societatis causa contingunt.* But positive law may ordain, none the less, *ut rei bello amissae nulla adversus civitatem actio sit, ut sua quisque arctius defendat*

The People as a sum, or a Collection of units

67. For Althusius the sovereign People is identical with the *consociata multitudo*, with *homines conjuncti, consociati et cohaerentes*, with the *universa membra conjunctim*, with the *populus universus*, with the *consociatio universalis*; with the *totum corpus* (*Polit.* Praef., cc 9 and 17, *Dicaeologia*, I, cc. 7–8) Similarly the author of the *Vindiciae contra Tyrannos* identifies the sovereign with the *populus conjunctim non divisim*, the *universi*, or the *universa multitudo* (qu. II, pp. 75, 89sqq., 91sqq., 114; qu. III, pp. 149, 171sqq., 297sqq.). To Buchanan, the sovereign is the *universus populus* (pp. 16, 30, 48, 78–80, 87): to Hotoman, it is the *universus populus* or *universi* (*Francogallia*, cc. 6–9 and 19), to Danaeus, the *subditi* or *populus universus* (I, c. 4, pp. 36–44, III, c. 6, pp 217 sqq), to Boucher, the *multitudo jure coacta*, which must not be confused with the *incondita et confusa turba* (I, c. 9); to Mariana, the *universi* (I, c. 8), to Salamonius, the *multitudo hominum* or *universi* (I, pp. 20, 36), to Rossaeus, the *universi* (c 2, §11); to Hoenonius, the *universi*, or *populus universus*, or *populus tributim curiatim centuriatim vel viritim collectus* (II, §§46, 51; IX, §5); to Milton, 'all as united together' (*The Tenure*, p. 9).

In the same way *majestas realis* is ascribed by Kirchner to the *societas populi coalita* (II, §1); by Paurmeister, to the *populus universus* (I, c. 17), by Berckringer, to the *populus universus... collective*—but also, at the same time, to the *singuli* as members of this collective body (I, c 4, §§6–8), by Alstedius, to the *subditi universi* (p. 18), by Werdenhagen, to the people as *collectivum quid*, possessed of quantitative and qualitative attributes (II, c. 6). Similarly, again, we find the 'Subject' of original sovereignty, and of the popular rights which persist after the alienation of that sovereignty, described in

Soto as the *multitudo collectim sumpta* or the *populus congregatus* (I, qu. 1, a. 3, qu. 7, a. 2; IV, qu. 4, a. 1–2); in Victoria, as the *multitudo* or *omnes simul* (III, nos. 8, 15); in Bellarmine, as the *tota multitudo* (cf. n. 62 supra); in Molina, as the sum of all (II, d. 22–3, 25, III, d. 6), in Suarez, as the *hominum collectio* or *multitudo* (cf. n. 62 supra). Grotius too regards the *universitas* as consisting only of *singuli quique congregati vel in summam reputati* (II, c 21, §7); and Keckermann describes the people as *collectivum quid ordinatum* (*Praecogn* p. 7).

68. The advocates of the theory of popular sovereignty, like those of the theory of 'double sovereignty', expressly emphasise the fact that the Ruler is superior to his subjects *ut singulis*, but inferior to them *ut universis*. Cf. the *Vind. contra Tyr.* qu. II, pp 91sqq., qu. III, pp. 391sqq.; Buchanan, pp. 79–80 (the king is to *singuli*, as the people is to the king), Salamonius, I, p 20 (the king is *major singulis, sed minor universis*, as being the *servus universitatis*, but not the *singulorum minister*) and p. 28; Rossaeus, c. 2, §11; Danaeus, III, c. 6, pp. 217sqq ; Althusius, c. 9, §18 (*non singulis, sed conjunctim universis membris et toto corpori consociati regni competit*); Hoenonius, II, §46 (*universi*, not *singuli*, are the *Superior*), Alstedius, p. 18 (*superior singulis, inferior subditis universis*) and pp 56sqq.; Milton, *Defensio* of 1651, p. 70 (*Rex est Rex singulorum*, and also *universorum*, but only *si voluerint*) *Omnes ut singuli* and *ut universi*

Conversely, the advocates of the sovereignty of the Ruler argue that the Ruler is superior not only to *singuli* but also to *universi* cf. Soto, IV, qu. 4, a. 1; Molina, II, d. 23, §8; Bornitius, *Part* p. 41, *De maj* c 4. Cf. also Bornitius, *De maj.* c 6 (the end of the State is *salus seu beatitudo reipublicae sive populi universi primum, deinde singulorum*), Suarez, III, c. 2, no. 4 (supra, n. 62); Grotius, I, c 3, §§7–9, 12, III, c 8, §4.

69. Cf Salamonius, I, p. 36 (although the *populus una interdum censetur persona*, it is only *ut ficte una*, and *vere populus non aliud est quam quaedam hominum multitudo*); Suarez, I, c 6, no. 17 (*una persona ficta*), III, c. 2, no. 4 (*unum corpus mysticum, quod moraliter dici potest per se unum*), *Vind. c. Tyr.* qu II, p 75 (*universitas unius personae vicem sustinet*, as the *Lex mortuo** teaches); Limnaeus, *Capitul.* nos. 48sqq (*majestas realis* is the power *quae Reipublicae adhaeret, hoc est universitati, quae non nisi ficte personae nomen inducere potest, ex personis tamen constat*), Grotius, II, c. 21, §8, Werdenhagen, II, c 6, §§22–4 (*persona* is used in political theory only for the *singulus*, but *in jure* it is also used for *populus*, for an office, for a *universitas*, and in all cases in which *plures personas unus sustinet*) *The unity of the People a 'Fiction'*

70. When a decision of the whole people is required, thinkers often speak vaguely of a *consensus populi* or a *voluntas universorum*, without going into the question whether or no they mean a regular act of an assembly which must follow the forms that are necessary for the decisions of a corporation· cf. Buchanan, pp. 16sqq , 30sqq., 78, Rossaeus, c. 2, §4 (the *consensus populi* as the will of the *Respublica*), Salamonius, I, pp. 8sqq., 11, 31sqq.; Mariana, I, c. 9, Vasquez, c 47, Molina, II, d. 25, Suarez, III, c. 4, nos. 1–2, c. 4, no. 5, c. 9, no. 4, Boxhorn, I, c. 3, §§15sqq. (since rule is contrary to nature, it depends on the constant *consensus* of *imperans* and *subditi*); Grotius, I, c. 3, §§8 (*populi universim sumpti arbitrio*), 13 (*populi voluntate delata*), II, c. 6, §§3, 7, 13, III, c. 20, §5 (*populi totius consensu*); Salmasius, c. 6 (sovereignty belongs to the King either *in* or *voluntate populi*). *The common will an agreement of many wills*

* The reference actually given in the *Vind. c. Tyr.* is to *Lex mortua* 22 D, de fidei commissis.

But we often find the decision of the people definitely treated as equivalent to the tacit and cumulative acts of consent of so many individuals. This idea is applied to the conclusion of the original contract of government, or to some later act of approval of a limited government which is a substitute for that contract: cf. *Vind c. Tyr* qu. III, pp. 264sqq., 287sqq ; [Beza's] *De jure mag.* qu. 5, pp. 18–20 (where the condition is made that the *consensus* must not be forced); Danaeus, I, c 4, p. 41; Hoenonius, IX, §§56–7; Suarez, III, c. 4, no. 4 (the *consensus* is 'tacit' when rule has been usurped, but it is *debitus* when subjection has been imposed by a just war), c. 10, no. 7 (*consensus tacitus*); Arnisaeus, *De auct.* c. 4, §§ 11–14, *De rep.* II, c 2, s. 5, c. 3, ss 7–8 (*consensus tacitus*, and until it is given there are no *subditi*), Knipschildt, VI, c. 4, nos 12–13 (no right [of government] exists until *subditi paulatim consensuerunt*), Fridenreich, c 10 (all Ruling authority rests upon *electio*, since it is the *consensus universorum* which has either devolved it upon the ruler originally, or legitimised it afterwards); Bornitius, *De maj.* c. 3, *Part.* pp 47sqq. (*consensus spontaneus aut coactus, expressus vel tacitus, verus vel quasi*, is what constitutes the Ruler); Grotius, I, c. 4, §§5sqq., II, c 6, §18; and see the author's work on Althusius, pp. 305–7.

Similarly we often find writers who argue that the consent of 'the people' is required for laws contenting themselves with an informal *approbatio* (Molina, II, d. 23, §§6–7, V, d. 46, §3) or an *acceptatio populi* (Suarez, IV, c. 19, and Claudius de Carnin, I, c. 3). In the same way *consensus tacitus* was held to suffice for certain alienations [of public property] (Grotius, II, c. 6, §§8, 10).

On the other hand, many thinkers demand a formal resolution by a regular assembly in certain cases. Most of them, though there are some exceptions, require it for the deposition of a lawful ruler who has become a tyrant 'in exercise', cf. Soto, IV, qu. 4, a. 1, Molina, III, d 6; *Vind c. Tyr.* qu. III, pp. 292sqq., Mariana, I, c 6 (*conventus publicus*), Althusius, c. 38, cf. the author's work on Althusius, pp. 309–12. Some writers also require an act of a regular assembly for the appointment of the Ruler, cf Soto, IV, qu 4, a. 2 (*publicus conventus*), *Vind. c. Tyr.* qu. III, pp. 248sqq It may also be required as a way of giving assent to certain alienations [of public property], cf. Grotius, II, c. 6, §9.

All must act if the People is to act

71. Molina, d 23 (supra, n. 62). Althusius (c. 9, §§16 and 18) holds that only *universa membra de communi consensu* can dispose of the *jus majestatis*, because only *membra regni universa simul* can constitute that right, but he also believes (cf. his Preface: cf also c. 9, §19; c. 18, §§15, 84, 104, 123–4, and c. 38, §§125–9) that even the whole of the people, acting unanimously, cannot make any valid alienation or division of sovereignty Hoenonius (II, §39) regards *regnicolae* as competent to decide *jura regni* 'by common consent'; cf. also his phrase (§40) *ex communi placito... vita socialis inter membra reipublicae instituitur et regitur.*

When unanimity required

72. The assumption of unanimity was taken for granted in regard to the contract of society; cf. Althusius, c. 9, §19; Suarez, III, c. 3 (*per voluntatem omnium qui in illa convenerunt*); Grotius, II, c. 5, §23 (vide supra, nn. 59–62). The *consensus omnium* is required for any change in fundamental laws by Bortius (*De maj* II, §17–21); and, as we have already mentioned (supra, n. 43), Besold (*De maj.* s. 1, c. 1, §5) and Tulden (I, c. 11) require the consent of *omnes singuli* in a democracy for any change of *ipsae leges democraticae.* According to Althusius (*Dicaeologia*, I, c. 87, nos. 37–43) a unanimous resolution

should also precede the imposition of new taxes. [Gierke adds a reference to a note in a previous section of his fourth volume (p. 241), which is not translated here.]

When majority-decision allowed

78. Cf. Althusius, c. 17, §58, Buchanan, p. 79 (*universus populus vel major pars* is legislator, creator of government, and judge of the King), Milton, *Defensio* of 1651, c. 5, pp 63–4, c 7, pp. 69–70 (*populi pars major et potior*, i.e. *plus quam dimidia pars populi*, is *Superior Rege*) Generally, a majority-decision was regarded as adequate both for the [original] choice of a form of State and appointment of a Ruler, and for any subsequent changes in the constitution, cf Victoria, III, nos. 14–15 (in the appointment of a Ruler a majority is enough, *etiam aliis invitis*, since the consent of all cannot be attained, the whole of Christianity might give itself a Ruler by majority-decision; and in the same way a majority in a republic may, if it wishes, choose a monarch), Soto, qu. 4, a 2, supra, n 43

The fiction that majority-decision is made equal to unanimous decision by a contract to that effect

74. In most writers we only find a reference to the general rules of the [Roman] law of corporations. Grotius is the first writer (II, c 5, §17) to use the fiction that the majority-principle must have been introduced by an act of contract into all associations, both public and private (*quod in iis rebus, ob quas consociatio quaeque instituta est, universitas et ejus pars major nomine universitatis obligant singulos qui sunt in societate*) He argues (1) that in each contract of society we must assume a *voluntas in societatem coëuntium.. ut ratio aliqua esset expediendi negotia*, (2) that this *ratio*, or way of transacting business, can only consist in the supremacy of the majority, because it is obviously improper *ut pars major sequatur minorem*, and therefore (3) that so far as special *pacta et leges* do not provide otherwise, *pars major habet jus integri* Hobbes takes a similar view (*De cive*, c. 6, §§1–2). Only unanimity is valid in a *multitudo extra civitatem*, but it marks the beginning of the transformation of such a multitude into a State when its members agree *ut in iis rebus, quae a quopiam in coëtu proponentur, pro voluntate omnium habeatur id quod voluerit eorum major pars* Otherwise no single will can be attained. If any person will not accept this agreement, the rest can constitute the State without him, and can exercise against him their original right—the *jus belli* cf. ibid. §20.

Representation of the People by Estates or 'Ephors'

75. See the author's work on Althusius, pp 216–19, and §12, n. 129 of this volume [not here translated] The author of the *Vind c Tyr* invokes, as the organ for securing the observance of the rights and duties imposed by contract (whether it be the contract made with God, or that made with the king*), not the *universa multitudo*, but the *electi magistratus regni*—the *officiarii Regni non Regis*, or *consortes et ephori imperii*—inasmuch as these officers *a populo auctoritatem acceperunt*, and thus *universum populi coetum repraesentant*. qu. II, p. 89, qu. III, pp 148sqq. A similar view appears in the *De jure mag* qu. 6–7 (*ordines sive status*), Buchanan, p. 30 (*ex omnibus ordinibus selecti*); Hotoman, cc. 13–14, Mariana, I, c. 8 (*proceres* or *deputati*)

Althusius includes both the 'Ephors' and the *summus magistratus* among the *administratores* of public authority, who are appointed and commissioned by the *consociata multitudo* because it cannot easily meet itself, and who, within the limits of their commission, *universum populum repraesentant* (c. 18, §§1–47): *Ephori sunt quibus, populi in corpus politicum consociati consensu, demandata est summa Reipublicae seu universalis consociationis, ut repraesentantes eandem potestate*

* The *Vind. c. Tyr* supposes two contracts—that of people and king with God (the divine covenant), and that of people and king (the secular contract of government).

et jure illius utantur in summo magistratu constituendo, eoque ope [*et*] *consilio in negotiis corporis consociati juvando, necnon in ejusdem licentia coercenda et impediendia in causis iniquis et Resp. perniciosis, et eodem intra limites officii continendo, et denique in providendo et curando omnibus modis, ne Resp. quid detrimenti capiat privatis studiis, odiis, facto, omissione vel cessatione summi magistratus* (ibid §48). These 'ephors' are appointed by popular election, but they may also be appointed, *ex populi concessione et beneficio*, by nomination or co-optation (§59) their commission may also be made hereditary *ex consensu consociationis universalis* (§107): they constitute a *collegium*, which acts *collegialiter* and by its *major pars* (§62). as such a college they discharge the *officium generale*, with which they are vested, of representative exercise of popular rights (§§63–89, c 38, §§28sqq.), but there is also, distinct from this 'general office' of the college, an *officium speciale* of individual 'ephors' (c 18, §§90–1, c 38, §§46–52) *

Hoenonius has a similar theory (II, §§46–51, IX, §§44–54) · *ephori seu ordines regni* have to exercise the right of the sovereign people *ex jussu et consensu populi* as *universi, quatenus universum populum repraesentant*, they are superior to the Ruler. Grotius argues (II, c. 6, §9) · *populum autem consensisse intelligimus, sive totus cõit . sive per legatos partium integrantium mandatu sufficiente instructos, nam facimus et quod per alium facimus*, cf I, c 3, §10, III, c. 20, §5. See also Fridenreich (c. 10), who holds that, in lieu of *universi*, smaller assemblies have often to elect the Ruler by virtue of 'delegation': Tulden (II, cc 19–23), who regards the *optima forma* as a *monarchia temperata, optimatibus aut dilectis populi in partem regiminis admissis*) Milton (*Defensio* of 1651, c. 7, p. 70), who argues that the objection of Salmasius (that we regard *plebs sola* as *populus*) is incorrect, for we include *omnes ordinis cujuscunque cives* in the people, inasmuch as *unam tantummodo supremam curiam stabilivimus, in qua etiam proceres ut pars populi, non pro sese quidem solis, ut antea, sed pro iis municipiis, a quibus electi fuerint, suffragia ferendi legitimum jus habent.*

The People as superior to its representatives

76. The author of the *Vind c. Tyr.* ascribes to the assembly of the 'ephors', as *Regni quasi Epitome*, equal rights with the people, and an equal superiority with the people over the king, inasmuch as any act of a majority of that assembly counts as the action of the people (qu II, pp 91, 94, 114, qu. III, pp. 148, 149, 248sqq., 297sqq , 326sqq), but he expressly insists that this assembly cannot, by any resolution or any omission on its part, forfeit the rights of the *populus constituens* (qu. III, p 173). The same line is adopted in the *De jure mag.* (qu. 6–7): the ephors, in regard to the Ruler, are *defensores ac protectores jurium ipsius supremae potestatis* [i e they are the guardians of popular sovereignty], but they cannot actually prejudice the sovereign rights of the people itself. Buchanan (pp. 30sqq) only allows the assembly of Estates to produce a προβούλευμα in the sphere of legislation, vindicating the right of final decision for the *universus populus*

Althusius safeguards the People as against its Ephors

77. Althusius expressly insists that though the Ephors, in their collective position as representatives of the sovereign People, are superior to the Ruler, and though, in their assembly, they exercise the rights of *majestas* in respect to him (c. 18, §§48–89, c. 33, c. 28, §§28–64, and also c. 17, §§55–61), they are merely commissioners of the people; *constituuntur, removentur, dejiciuntur aut*

* This whole theory of the 'ephorate' (which appears later in Fichte) is derived from Calvin's *Institutes* (IV, c. xx, §31) where he speaks of 'magistrates constituted for the defence of the people, to bridle kings, such as the Ephors in Sparta, the tribunes at Rome and to-day, it may be, in each kingdom the Three Estates assembled'.

exauctorantur by the people; and they must recognise the people as their *Superior* (c. 9, §§22–3). Accordingly while he applies to the Ephors the principle that the action of corporate representatives counts as the action of the corporation itself (c. 18, §§11, 26, 53–8), he limits the application of this principle by the *limites* of their commission (ibid. §§41–6), and he expressly argues that the Ephors cannot transfer any right of the People to the Ruler, or forfeit any such right by omitting to exercise it, since, in that case, *penes Ephoros, non Rempublicam et Populum, summum Reip jus esset* (ibid §124) Again, if there be any failure of the Ephors, he claims that all their functions revert to the community of the people, in virtue of its imprescriptible and inviolable right, and then these functions are to be exercised *consensu totius populi tributim, curiatim, centuriatim vel viritim rogati aut collecti* (ibid. §123). Similar views appear in Hoenonius, II, §§46, 51, IX, §50.

The People itself as the true 'Subject' of popular rights

78 This is the view of Hotoman (cc. 13sqq), Boucher (I, c. 9, II, c. 20; III, c. 8), Danaeus (III, c 2, p 221), Mariana (I, c. 8), Milton (op cit.): cf. Alstedius, pp 56–61 (the *ordines* [or Estates] are a *Reip. compendium*), Fridenreich, c. 29, and Keckermann, c. 4, pp. 561sqq We also find German professors of public law (and especially Paurmeister, Besold and Limnaeus) generally ascribing to the people of the Reich the rights exercised by the Reichstag, and even the electoral right of the Electors, just as they also ascribe the rights of provincial Estates to the people of the province as the true 'Subject'. cf. supra [in a part of vol IV not here translated], p. 242 n 129 Bortius (*De maj* V, §9), in speaking of *majestas realis*, remarks that its possessor is *tota Respublica, et secundario ordines et status regni*

79. See the author's work on Althusius, pp. 90–91, 343.

80. Supra, n. 46.

81. Supra, n. 47.

The plurality of the 'Subject' of Sovereignty in a Republic

82 The 'Subject' of Sovereignty in a Republic is *plures*, according to Victoria (III, no. 10), Bellarmine (*De laicis*, c 6), Busius (I, c. 3, §4), Keckermann (II, c. 2), and others; it is either *pauci* or *universi*, according to Bodin (II, c 1) and Suarez (III, c. 4, nos. 1, 5–6, 11) it is *multi*, which may again be either *pauciores* or *universi*, according to Bornitius (*De maj* c 3, and *Part* p 45) it is *pauciores* or *tota civitas*, according to Winkler (V, c. 4). Similarly, in the view of Grotius (I, c. 3, §7), *plures* are the *subjectum proprium* of *majestas* in a Republic, and *plures* or *universi* are the 'Subject' of *majestas personalis* in this form of State on the theory of the advocates of 'double sovereignty' (e g. Alstedius, p. 14, Tulden, p. 12, Besold, *De maj.* sect I, cc. 2–7). The theorists of popular sovereignty also make a plurality of persons into the organ of government in Republics· cf Mariana, I, c. 3; Danaeus, I, c. 6, and Althusius, c. 39, §1 (*summus magistratus polyarchicus*) On the technical term 'Polyarchy' see n. 46 supra

The plurality a collective plurality

83. Cf Bodin, II, c. 6 (the magnates, in a system of aristocracy, *collectim imperant*), and c. 7 (where the same is said to be true, in a *status popularis*, of the *cives universi*), Bornitius, *Part.* p 51 (the *cives collectim uniti* are to be regarded as the Ruler), Keckermann, II, c. 2 (*plures ex aequo indivisim*), Althusius, c. 39, §§32sqq. (when there is a *magistratus polyarchicus*, the ruler is *omnes conjunctim*), §§46sqq. (when there is a [*magistratus*] *aristocraticus*, the exercise of majesty belongs *conjunctim et indivisim paucis optimatibus*), §§57sqq (when there is a [*magistratus*] *democraticus*, the *populus consociatus* is also the *summus magistratus*). Similar views occur in Hoenonius, IX, §3, X, §40; cf. also Gregorius, V, cc. 1–2; Molina, II, d. 23, §§1–14; Heider, pp. 976sqq.;

Crüger, *Coll. pol. Disp* I, III, IV; Arnisaeus, *De rep.* II, cc. 4–5; Knipschildt, I, c. 1, no. 50 (*plures ut universi*).

This collective plurality is a single, but artificial, Ruling 'person'

84. Arnisaeus (*De maj.* I, c. 2; *Polit.* c 11) contrasts the republican Ruler, as *conspiratione vel analogia unus*, with the Ruler who is *unus natura*; Berckringer (I, c. 4, §10) opposes the *unus analogia* to the *unus numero*, Graszwinkel (cc. 3, 11) contrasts the *corpore unus* with the *persona unus*, Bornitius (*Part.* p. 45; *De maj.* c. 3) opposes the *unus τῷ λόγῳ* to the *persona unus*. Keckermann (*Polit* I, c. 2) explains that the whole perfection of the *status polyarchicus* depends upon the *plures qui imperant* assimilating themselves by their unity to a monarch. According to Althusius (c 39, §59) the essence of democracy lies in the fact that *populus ipse instar unius exercet jura majestatis et quasi unum repraesentat in imperando* Hippolithus a Lapide (I, cc. 3, 4, 6, 14, 15) assigns the rule in an aristocracy to the privileged Estates as constituting *unum corpus, universitas vel collegium*, etc Cf. also Suarez, III, c. 3, nos. 7–8.

Hobbes (*De cive*, c. 7, §§13–14, c 12, §8, *Leviathan*, c. 18) insists most definitely that, as compared with the *natura unus* on which the will and action of the people is devolved in a monarchy, the democratic assembly or the aristocratic *curia* constitutes only an artificial unity. He draws the conclusion that, while a monarchical Ruler may contravene the Law of Nature, a republican Ruler cannot, on the ground that in the former case the natural and the artificial will are one and the same, but in the latter there is only an 'artificial will'. The pre-eminence of the monarchical form of State is constantly referred by most writers to the superiority of natural unity over unity which is artificial, cf. e g Bodin, VI, c 4, nos. 710sqq., Hobbes, *De cive*, c. 10, *Leviathan*, c. 19

85. Cf Bodin, II, cc 6, 7; Bornitius, *Part.* 41, *De maj.* c 3, Althusius, c 39, §§32sqq , Hobbes, *Leviathan*, c. 18, Hippolithus a Lapide, c 3, sect. 3, c 6, sect 3, c 7 Mention has already been made (supra, nn. 42, 43) of the difficulties into which thinkers fell in this connection, when they sought to extend to democracy the distinction between the people as the 'Subject' of popular rights and the people as the duly constituted Ruler Keckermann (II, c 3) finds even in a democracy [no less than in an aristocracy] a system of reciprocal alternation of ruling and being ruled

The community in a democracy identified with the majority

86. Bodin (II, cc. 1, 6–7) refers the whole distinction between aristocracy and democracy to the numerical relation of rulers and ruled, making the former a rule of the minority, and the latter a rule of the majority. But since, from this point of view, he ranks as a democracy a state of 20,000 citizens in which 11,000 participate in the popular assembly, and since, again, he allows a majority of the assembly so constituted to decide, it follows that the *universi vel major pars* who, on his definition, are the rulers in a democracy may in certain circumstances be represented by a minority of the community.

Grotius again and again enumerates together the king or the *major pars procerum* or the *major pars populi* as being the 'Subjects' of international rights, according to the form of the constitution: cf. e.g. III, c 20, §§2–4. Hobbes (*De cive*, c. 5, §8) says bluntly: *voluntas autem concilii intelligitur esse, quae est voluntas majoris partis eorum hominum, ex quibus concilium consistit*, cf. c. 7, §5. See also Bornitius, *Part.* p. 45 (*universis aut majori parti*), Keckermann, II, c. 1; Besold, *Disc.* III, *De democratia*, c. 1, §1 (*populus vel major pars*).

87. Cf. Bodin, II, cc. 6–7; Althusius, c. 39, §§37sqq. and 58sqq.; Hobbes, *De cive*, c. 7, §§6 and 10 (in an aristocracy, he argues, just as in a democracy, the time and place of the meeting must be fixed, because otherwise there will be *non persona una, sed dissoluta multitudo sine imperio summo*. For this reason the *coetus* or *conventus* is often described as the Ruler, and Hobbes constantly avails himself of the formula that Sovereignty resides either in *unus homo* or in *unus coetus* or *unum concilium*). *The assembly in a Republic described as the Ruler*

88. See the antitheses in n. 84 supra.

89. Cf. Bodin, I, c. 8, nos 105–6 *Princeps majorum pactis conventis aeque ac privatus obligatur, si regnum haereditario jure obvenerit, vel etiam testamento delatum sit*: otherwise [i.e. where he has not obtained the Crown by inheritance or by will], he is [only] obliged *quatenus Reipublicae commodo contractum est.* [Gierke seems to have telescoped the argument of Bodin, which is really to the effect (1) that a king succeeding by hereditary or testamentary right is bound as a private man by the *pacta conventa* of his predecessors in title, but (2) that such a king is only bound to respect such *pacta* to the extent to which his predecessors were themselves bound—i e. to the extent to which they were made for the benefit of the State] Cf. also Arnisaeus, *De jure maj* I, c 7. *How far is a Ruler obliged by the acts of his predecessors?*

Grotius (I, c 7, §§11–37, II, c. 14, §§10–14, III, c 20, §6) also starts from the point of view of the law of inheritance He distinguishes two cases (1) When they are *omnium bonorum heredes*, the *successores* are absolutely obliged by the actions of their predecessors, (2) when *in jus regni dumtaxat succedunt*, they incur no personal obligation at all In the latter case, however, there *is* still an obligation, which is produced and mediated *per interpositam civitatem* There is a presumption that the devolution of supreme authority on a Ruler involves, as part of itself, the simultaneous devolution of the *jus se obligandi, per se aut per majorem sui partem*, which belongs to the people just as it belongs to any other group (II, c. 14, §10) It thus follows that, in so far as the people itself is obliged in virtue of this *jus se obligandi*, the *successor* will also be obliged *ut caput* (ibid §12) Now an obligation of the people is to be assumed not merely in any case of *utiliter gestum* [where there has been an act done in the definite expectation of a benefit], but also in any case where *probabilis ratio* is present [where there is good ground for expecting a benefit from an act done], and it is only in regard to contracts previously made by usurpers that the people—and with it, therefore, the *rex verus*—has merely a limited liability *de in rem verso* [for expenses actually incurred] (ibid. §14).

90. Grotius, II, c. 14, §§1–2 and 6; III, c 20, §6 Controverting the thesis of Bodin, that the sovereign can dispense himself from his contracts, or recover his freedom of action (*in integrum se restituere*) in respect of such contracts, Grotius (II, c. 14, §§1–2) distinguishes *actus Regis qui regi sunt* and *actus regis privati*. The first sort of acts count *quasi communitas faceret in tales autem actus, sicut leges ab ipsa communitate factae vim nullam haberent, quia communitas seipsa superior non est, ita nec leges regiae; quare adversus hos contractus restitutio locum non habet; venit enim illa ex jure civili* At the same time Grotius maintains that the people can challenge such *regii actus* [though they count as acts done by itself] on the ground that they exceed either the special limits of the Ruler's right [in a given case] or the general limits of such right [in all cases]. The private acts of the king, on the other hand, count *non ut actus communitatis sed ut actus partis*; and in case of doubt they fall under the ordinary *Grotius distinguishes between the official and the personal acts of the King*

law, and are thus subject to *restitutio in integrum* and to the King's power of dispensing himself from *leges positivae.**

In the same chapter (II, c. 14, §6) Grotius allows that contracts between the king and his subjects always give rise to a true and proper obligation; but he adds that it is only under Natural Law that this obligation can be asserted if the king has acted *qua rex*—though it may be also asserted at civil law if he has acted otherwise [i.e. *qua privatus*].

91 Grotius himself, in the passages just cited, has recourse to the right of the community of the people and the devolution of that right.

The analogy of the Body Politic

92. Cf. Guevara, *Horologium Principis*, I, c 36 (based on John of Salisbury —see Gierke, *Political Theories of the Middle Age*, translated by F W Maitland, p 24): cf also Knichen, I, c. 6, thes 11 (which is similar), Modrevius, *Of the betterment of the general welfare*, 1557, p. 162, Buchanan, pp 135qq (a comparison of *societas civilis* with the human body and its ordering, articulation, harmony and unity), Gregorius Tholosanus, I, c 1, §§6–16, III, c. 1, §1, X, c 1, §1, XVIII, c 1, §4, XXI, c. 1, §§4–10, and elsewhere (analogy of the *corpus civile* with the *corpus physicum*, in regard to head and members, soul and nerves, harmony and unity, and the different powers and functions of the different parts: see also his *Syntagma*, III, c. 2, §§1–2), Lessius, *Dedicatio* of 1605 to the Archduke Albert of Austria (comparison of the Prince with the *caput*, of the *respublica* with the *corpus*, of *civitates* with *membra*, of *cives* with *artus ex quibus membra et totum reipublicae corpus coalescit*), Besold, *Princ. et fin. polit. doctr. Dissertatio*, I, c 5, §4, c 8, §1, *Diss de maj* sect. 1, c 1, §4, sect. 3, c. 3, §2, c. 7, §3 (comparison of the State with a *corpus physicum* or *corpus humanum*, in respect of its head and members, and the different *functiones* of each), Berckringer, I, c. 4, §10 (the Rulers are the head of a body, whose parts have also their functions), Werdenhagen, II, c. 24 (the essence of the State is *unio—summum illud venerandum vocabulum mysticum*—a union produced by *status et ordinatio harmonica*, just as in a physical body), cf also Bodin, II, c. 7, no 236 (*reip partes ac veluti membra singula, quae principi reip quasi capiti alligantur*). It still continued, in our period, to be a favourite habit of thinkers to pursue this analogy into a theory (1) of the growth, the successive ages, the maladies and the death of States, and (2) of the methods which were serviceable in preserving or restoring their health: cf. Buchanan, op cit.; Gregorius, lib. XXI–XXIV, Besold, Diss. II, *de republica curanda*; Knipschildt, I, cc. 15–17. [On this analogy in general see Maitland, *Collected Papers*, III, pp. 285–303.]

Sovereignty as the Soul of the State

93. See Besold, *Diss.* I, c 5, §1; Arnisaeus, *Polit* c. 6, *De rep.* I, 5, s. 3, Bornitius, *De maj* c. 5, *Part* p. 45 (the *finis principalis* of *majestas* is *animare imperio summo universali rempublicam*), Fridenreich, c 10 (government is the *spiritus vitalis* of the body politic); Bortius, *De maj.* V, c 8, Graszwinkel, c. 4 (*quod in universo Deus, in corpore anima, id in imperio majestas est*), Knipschildt, I, c 1, nos. 50–51; Tulden, I, c. 9 (*urbs = corpus, civitas = anima, respublica = animus mens et ratio*). [With the dictum of Graszwinkel compare a dictum of the eighteenth century, quoted in Van Tyne, *Causes of the War of American Independence*, I, p 218, to the effect that 'legislative sovereignty is as essential to the body politic as the Deity to religion'.]

* Grotius thus disagrees with Bodin so far as official acts of the king are concerned (the king cannot dispense himself from an official act of contract, or recover freedom of action in regard to such an act); but he agrees with him in regard to personal acts of the king.

94. See Gregorius, I, c. 1, §§6–7 and XVIII, c. 1, §4 (*corpus civile, quod ex singularibus personis proprio corpore et animo compositis, tanquam membris, constat*); cf. also Besold, *De maj* III, c. 7, §3

95. See Victoria, III, no 4, Soto, IV, qu. 4, art. 1; Molina, II, d. 22, §§8–9; Suarez, III, cc. 1–3 (supra, nn. 60–61). Vasquez, however, in c 47, nos. 6–8, warns his readers against drawing conclusions from the analogy between the relation of *populus* and *cives* and that of *corpus* and *membra*. There are also, he contends, fundamental differences the limb cannot change its position, and the citizen can; the foot or the hand cannot become head, but any citizen may, the death of the head causes death of the limbs, but the death of the head of the State produces no similar effect, in the body government remains always in the head, but in the State it may change its residence. *Vasquez on differences between the body and the Body Politic*

96. Althusius, Praef and c 9, §§18–19 'majesty', like the *anima in corpore physico*, resides as an indivisible and inalienable unity in the *corpus symbioticum universale* considered as a whole: it is the basis of the rights of government which this whole exercises over its parts Cf also *Dicaeologia*, I, c 7

97 Grotius (II, c 9, §3), referring erroneously to ancient writers,* ascribes ἕξιν μίαν or *spiritum unum* to the people, regarded as a *corpus ex distantibus* [sc. *compositum*] He adds, *is autem spiritus sive ἕξις in populo est vitae civilis consociatio plena atque perfecta, cujus prima productio est summum imperium, vinculum per quod respublica cohaeret; plane autem haec corpora artificialia instar habent corporis naturalis.* Just as the latter [the natural body] *idem non esse desinit particulis paulatim mutatis*, so the former—the 'moral' body of the People—remains the same though its members change But like the natural organism, the People may also succumb, and lose its rights, and it may do so (1) *interitu corporis*, that is to say, either by the simultaneous disappearance of all its members (§4) or by the disintegration of their unity (§5), or (2) *interitu spiritus*, that is to say, by losing any supreme authority (§6) On the other hand, the People still remains a 'Subject' of rights and duties, as much as ever, in spite of any alienation of territory (§7) or any alteration of the constitution (§8), and the union of two peoples to form one (§9), or the division of one people into several (§10), produces no loss of a people's rights, but only a *communicatio* or *divisio* of rights, as the case may be. See further I, c 1, §6, c 3, §7, II, c. 5, §23 (*maximum jus corporis in partes*), c. 6, §§4–5 (*imperium* in an undivided body politic is like the soul in the body), c 16, §16 (the body politic remains the same even if the constitution be altered), c 21, §7 (on *mors* of the body politic) *Grotius on the analogy of the Body Politic*

But Grotius, while he notes these analogies, also remarks (I, c 3, §7) that in contrast with the 'natural body' the *corpus morale* may have one common head for a number of bodies [e g. in the case of a federal State] Going more into detail (II, c 6, §§4–5), he argues that the 'moral body', being *voluntate contractum*, is different in kind from the 'natural body' Owing to its contractual origin, the integral parts of a moral body are *non ita sub corpore ut sunt partes corporis naturalis, quae sine corporis vita vivere non possunt, et ideo in*

* Gierke here refers the reader back to vol III of the *Genossenschaftsrecht*, p 22, n. 47, and to the correction on p VIII of his preface to that volume. The point is that Grotius was doing violence to Stoic theory, and to Plutarch and the Roman lawyers who used that theory, when he ascribed to them his own idea that a single spirit pervades bodies composed of different parts The Stoics and their followers, Gierke contends, held no such view.

usum corporis recte abscinduntur. The right of a moral body over its parts is *ex primaeva voluntate metiendum*, and the amputation of parts against their will is therefore unjustifiable; while, conversely, the part may secede from the body —not, it is true, without due reason, but the plea of necessity will serve as such a reason. Again 'the right of a part to protect itself' is greater than 'the right of the body over the part', *qua pars utitur jure quod ante societatem initam habuit, corpus non item.* Grotius also emphasises the point (in his note to II, c. 9, §3) that it is only ἀναλογικῶς that he speaks of the *corpus* and the ἕξις or *spiritus* of the People.

The double 'Subject' of sovereignty

98. Grotius, I, c. 3, §7 *ut visus subjectum commune est corpus, proprium oculus*, so the whole body politic and the Ruler are both simultaneously 'Subjects' of political authority [the one generally, and the other specifically].

99 Whereas Victoria (III, no. 4) still expressly insists that the *civitas* is no *inventum* or *artificium*, but *a natura profecta est*, and therefore properly comparable to the human body, Grotius already speaks of it as a *corpus artificiale*, and as *voluntate contractum* (cf supra n 97 and II, c. 9, §8)

Hobbes on the analogy of the Body Politic

100. Compare the introduction to the *Leviathan*, where *is qui summam potestatem habet* is described as *anima totum corpus vivificans et movens*, the authorities and officials are the artificial joints; rewards and punishments are the motor nerves, the wealth of all is the strength of the body; the safety of the people is its business or function; the counsellors are its memory; equity and the laws are its artificial reason; concord is its health, sedition its sickness, and civil war its death Finally, *pacta quibus partes hujus corporis politici conglutinantur imitantur divinum illud verbum 'Fiat' sive 'Faciamus hominem' a Deo prolatum in principio cum crearet mundum* Cf *Leviathan*, c 17, *De cive*, c 5

The organism of Hobbes is really a mechanism

101. Introd to the *Leviathan* just as *ars humana* imitates nature, which is the *ars divina*, and just as it creates (in the watch, or automaton, or machine with springs and wheels) an *artificiale animal* with a *vita artificialis*, so it also imitates that *nobilissimum animal* Man *Magnus ille Leviathan, quae Civitas appellatur, opificium artis est et Homo artificialis, quamquam homine naturali, propter cujus protectionem et salutem excogitatus est, multo major*, and Man is here at one and the same time *materia* and *artifex.* Cf *De cive*, c 5 and c 7, §§ 10sqq , and *Leviathan*, c. 17, on the *voluntas artificiosa* of this body, *Leviathan*, c 19, on *successio* as the way of continuation of its *vita artificialis*, ibid , c. 20 and following, on the mathematical rules for the construction of this artifice, and c. 21 [? c. 26] on laws as *vincula artificialia*

People and State identified by Monarchomachi

102. Thus the *Vind c Tyr*, qu III, describes the king as *minister* or *servus Reipublicae* (p. 144), and the representatives of the People as *officiarii Regni non Regis* (p. 148), but otherwise always depicts the community of the People as the 'Subject' of supreme authority (pp. 143sqq , 248sqq., 292sqq.). In the same way Hotoman makes the immortal *Respublica* or the *Regnum* superior to the mortal king (*Francogallia*, c. 19); but he proceeds to identify this 'Subject' [of supreme authority] with *ipsa civium ac subjectorum universitas et quasi corpus reipublicae* and with the *populus* (ibid. c. 19, *Quaest. illust.* qu. 1), and he expressly declares that *summa potestas est populi* (*Francogallia*, c. 19). Boucher (I, c. 9) states in so many words that the sovereign People in its corporate unity is identical with the *Regnum* or *Respublica*· cf. II, c. 20, III, c 8 Rossaeus (c. 2, §§ 1 and 11) ascribes to the king only a *potestas potestati Reipublicae subjecta*, and declares the *Respublica universa* to be *superior* [i.e. sovereign] Mariana (I, cc. 8–9) sometimes describes the *Respublica*, and sometimes *universi*, as the 'Subject' of majesty. According to Hoenonius (II,

§§ 39, 41, 51, and IX, §§ 5, 44–50) it is the *Respublica*, the *Respublica seu membra ejus*, the *populus*, the *populus universus*, or the *totus populus*, which is the *verus dominus* of political authority, the source of all government, and *potior Monarchis*. In the treatise [of Beza] *De jure mag.* (qu 6), *summum imperium* is ascribed to the People, but occasionally this *summum imperium* is itself personified. cf. pp. 26 sqq, where the *magistratus subalterni* are described as dependent not on the *summus magistratus*, but on *ipsa supremitas* or on *summa illa imperii seu regni* δύναμις *et authoritas*, cf also pp. 37 sqq. and 74 sqq., where the Estates are regarded as *defensores ac protectores jurium ipsius supremae potestatis*, even as against the Monarch himself In Buchanan (pp. 16 sqq, 48 sqq and 78–90) and in Danaeus (I, c. 4, III, c 6) it is the *populus universus* or *subditi* who appear as the 'Subject' of supreme authority.

Rights ascribed indifferently to People or State

103. The *Vind c Tyr.* (qu II, pp. 89, 114 sqq, qu. III, pp 89, 114 sqq., 131 sqq., 144, 148, 192 sqq, 196, 292 sqq)* deals in this way with the appointment of kings and representatives of the People, with the right of legislation, with the control of officials, and with the right of resistance or deposition in the event of disobedience to God or *felonia contra populum* [i.e. it sometimes ascribes all these rights to the *Populus*, and sometimes to the *Respublica*]. Hotoman (cc 6–8) deals in the same way with the right of appointing, judging and deposing the king, and with the right of deciding about a disputed succession. Cp. Rossaeus, c. 2, §§ 8–9 (on the right of the *Respublica* in the matter of legislation and consent to taxation) with § 4· cf also Boucher, I, cc 10–19 and III, cc 14–17.

So with public property

104 Cf the *Vind c. Tyr* (qu III, pp. 218 sqq and 235 sqq): the *patrimonium Regni* belongs to the People, and not to the king. the king has no right of property in the possessions of the Fisc, the demesne, etc., and he cannot therefore alienate any part of them indeed, he is not even the *usufructuarius* (since he cannot so much as contract a mortgage), but only the *administrator*. Hotoman (c 9) argues that the *nuda proprietas* in the demesne, regarded as the *dos Regni*, resides *penes universitatem populi sive Rempublicam*, cf. *Quaest illustr* qu I According to Hoenonius (II, c. 39) *jura regni, ratione proprietatis et dominii, pertinent ad Rempublicam seu membra ejus, sed ratione usus et administrationis spectant ad magistratum, cui sunt commendata*, cf. also V, § 72, where a distinction is drawn between the *aerarium publicum*, which is *Reipublicae proprium*, and the *aerarium Principis*, which belongs to him as a private person.

So, too, with public decisions

105. Cf *Vind c Tyr.* (qu. III, pp 196 sqq) on *Reipublicae consensus* in legislation. Rossaeus (c. I, § 3) makes the *Respublica* choose the form of the State and determine *quibus velit imperandi et parendi conditionibus circumscribere*, and similarly (c. 2, § 11) he makes it able *potestatem Regis dilatare, restringere, commutare, penitus abrogare aliamque substituere.* According to Mariana (I, c. 9) the King cannot alter the *leges universae Reipublicae voluntate constitutas, nisi universitatis voluntate certaque sententia.* Cf. on this supra, n. 70.

Similarly, Althusius identifies Respublica *and* Populus

106. Althusius, in his Preface, begins by describing the *Respublica vel consociatio universalis* as the 'Subject' of the rights of majesty, which belong to this *corpus symbioticum* in the same sense as we may attribute to it *spiritum animam et cor... quibus sublatis corpus illud etiam pereat* The *Princeps* is only an *administrator* [of the rights of this body], and the true *proprietarius et usufructuarius* is the *populus universus in corpus unum symbioticum ex pluribus minoribus*

* Something has gone wrong with Gierke's references here, as he repeats the reference to p. 89 and pp 114 sqq. twice over, for quaestio II and quaestio III.

consociationibus consociatus. The *Respublica* cannot transfer or alienate these rights of majesty, even if it wishes, any more than an individual can share his life with another. At the same time, however—both in this context, and when he subsequently proceeds, in the body of his work, to justify these general principles in detail (cc. 9, 18, 19, 38) and to deal with the several rights of majesty (cc. 10–17)—he identifies this sovereign body which possesses the *regni proprietas* with the *populus*; and he identifies the *populus* in turn with the *universa membra consociata* or with *omnes simul*. Similarly he ascribes to the 'People' the property and usufruct in *res publicae et fiscales*, assigning to the *summus magistratus* [only] the power of administering them *instar tutoris*, with such rights as the 'People' has granted (c. 37, §§ 1–2), but in the same breath he describes the *Respublica* (ibid. §§ 117–18) or the *corpus consociatum* (c. 17, §§ 1 sqq.) as being the owner.

The persona Civitatis *in Salamonius*

107. Salamonius, *De principatu* (1, pp 28–9), seeks to prove that *Princeps suis legibus ligatur* by the help of a distinction, based upon Cicero,* between the *Persona Civitatis* and the *Persona Principis*. Since it is the *Persona Civitatis* which is acting through the *Princeps* when he issues laws or does any other act of government, the Ruler who obeys his own law submits himself not to himself, but to *ea persona quam gerit*. It is true that he represents that 'person' [the *Persona Civitatis*], but he only does so *ut gerens* [and he does not therefore absorb it into himself]. In reality, *both* 'persons' act at the same time, but they act in different ways—the *Civitas* acting *ut mandans*, and the *Princeps ut mandatarius*, with the result that the *mandans* acts *ut major*, and the *mandatarius ut minister*. It follows that it is *ipsa Civitas* which *vere agit et vere leges condit*

It is really the same as the People

But Salamonius always identifies this *Civitas* [or *Persona Civitatis*] with the *universus populus* which creates the Ruler and remains his *Superior* (pp 16–28), he treats the *leges ab universo populo scriptae* as being *pacta* between the People and the Ruler (pp. 8–16), and he interprets the People itself as a *societas*, and the Ruler as its *praepositus* or *institor* (supra, n. 69). See also his *Commentariolt*, folio 41 verso

The Ruler confronts the Respublica *or* Populus *as something external to it*

108. It is true that the Ruler is often described as *Reipublicae pars*, and the principle that the whole is greater than the part is often applied in favour of the sovereignty of the People (e.g. in Salamonius, pp 40–1, and in Mariana, 1, c 9). But as the 'Subject' of the rights of the Ruler this 'part' leaves the Whole, and is made to form an antithesis to a separately and independently existing personality of the People, of which it is depicted as being the servant, administrator, mandatory or agent, cf. supra n 104 and n. 107 All the *Monarchomachi* accordingly insist that the People is *prior Rege* in time [as well as in importance], and that it only proceeds to erect a ruler, by its own free choice, *after* it has already constituted itself: cf Buchanan, pp 16ff, p. 69, the *Vind. c. Tyr*, qu II, p. 148 (*Rex per populum, propter populum, non sine populo*); Rossaeus, c 1, §§ 1–3, Boucher, 1, cc. 10sqq, Danaeus, 1, c 4, pp. 36–44, Hoenonius, IX, §5 (*populus enim et prior et potior est Monarchis, quippe quos rectores et curatores Reipublicae is creat et constituit*). Althusius is particularly emphatic in explaining that the People (which is *tempore prior*, and which, as the constituent organ, continues to be *prior et superior* to the organs which it constitutes) first of all associates itself to form a 'body', and then—but only then—appoints *ministri et rectores* to avoid the difficulties of getting all its members to meet together. These 'ministers and

* Gierke here refers to vol. III of his *Genossenschaftsrecht*, p. 24 n 52.

governors', it is true, *universum populum repraesentant, ejusque personam gerunt in iis quae Reipublicae nomine faciunt*, but they remain *famuli et ministri* of the 'associated multitude', and their right of action is derivative (c. 18, §§5–15, 26–31, 92–106, c. 19, §§2–3, c. 38, §§121–2). Even so, however, and even while he thus separates People and ruler as two parts, he also describes the constituent People at the same time (c 18, § 18) by the style of *ipsa Respublica* [as if it were the Whole]

The theory of contract involves a dualism of People and Ruler

109. In the *Vind c. Tyr* the contrast is particularly marked between *Populus* and *Rex* as two separate 'persons', who first contract jointly with God, and then form a second contract with one another, on which it follows (1) that the king on his side has a right to take measures of correction against the People, in virtue of the contract made with God, inasmuch as he pledges himself for [the good behaviour of] the People by entering [jointly with it] into that contract (qu II, pp. 84sqq.), and (2) that he also acquires rights as against the People, in virtue of the *contractus mutuo obligatorius* which he has made with it, if it becomes *seditiosus* by breach of such contract (qu III, pp 260sqq.). A similar view appears in Boucher, I, cc 18sqq. Danaeus also, in dealing with the relation of the Ruler to the People, applies the idea of contract strictly [to both parties] cf I, c. 4, pp. 41 (where he speaks of a voluntary 'pact', the violation of which extinguishes rights on both sides), 43, III, c. 6, pp. 214sqq (so long as the fundamental laws are observed by the Ruler, the People on its side cannot touch the constitution or, more particularly, the royal right of succession, inasmuch as *contractus populi cum Principe et ejus familia ab initio quidem fuit voluntatis, postea autem factus est necessitatis*, it is only in the event of the Ruler breaking the pact that the People also becomes free, or can proceed to the deposition of the Ruler and his family and an alteration of the constitution). Similar views are to be found in [Beza's] *De jure mag* qu 5 and 6 (where the idea of *mutua obligatio* appears throughout), Hotoman, *Francogallia*, cc 13 and 25, *Quaest. illust* qu I, Salamonius, I, p 11, Rossaeus, I, c. 1, §4, c 2, §6 (*obligatio reciproca*) and §11 (resistance and deposition are only possible *ex justa causa*): Mariana, I, cc 6 and 8, Hoenonius, II, §41 (*pactio reipublicae*) and IX, §§44–54.

In the same way Althusius, while he applies the category of *mandatum*, is not prevented thereby from treating the *commissio regni sive universalis imperii* to the supreme magistrate as a *contractus*, made by reciprocal oaths and entailing reciprocal obligations (cc 19–20, esp. c 19, §§6–7 and 29sqq), which confers on the Ruler [as well as on the People] a right that is only forfeited by definite breach of contract (c. 38). He ascribes to the governing authorities full *administratio* and *repraesentatio* of the State-authority, within the limits of the constitution (c. 18, §§26sqq.), though he holds, it is true, that if they overstep their 'laws and limits' they cease to be 'ministers of God and the universal association', and are only '*privati . quibus obedientia in illis quibus suae potestatis limites excedunt non debetur*' (ibid. §§41–6 and 105). He treats the contract of government as a naturally imposed element in the constitution of a State (c. 1, §§32–9, c 18, §§20–4), and he seeks to prove its presence in all forms of State (c 39); but in dealing with democracy he substitutes [for the ordinary contract of ruler and ruled] a contract between the community of the people, which directly exercises the rights of majesty itself, and the bearers of authority who 'represent' it successively from time to time (c 39, §§57–9). See the author's work on Althusius, pp. 144–9.

Approximations to Rousseau

110 Some degree of approximation [to Rousseau's theory] is to be found in Buchanan (pp 16sqq., 48sqq, 78sqq), who is reproached even by Rossaeus (I, c. 1, §4) with contempt of the right of the Ruler, and still more in Milton, who goes to the length of allowing the deposition of the king by the People, in virtue of the right of self-determination of free-born men, even if there be no other occasion than the wish for a change of the constitution (*The Tenure*, pp. 14sqq.) But there was no thinker before Rousseau who definitely and in principle denied that there was any contractual relation between the sovereign People and the Ruler; see the author's work on Althusius, pp 91sqq [Locke's theory already makes the relation between them not a relation of Contract, but one of Trust. see below, n. 68 to §16]

111 See Regner Sixtinus, I, c. 1, no. 23; Paurmeister, I, c. 3, no. 10, c. 18, nos 6–10, c 23, no. 13, Kirchner, II, §1, Boxhorn, I, c 4, §§1–27, Alstedius, pp 14 and 69sqq, Arumaeus, IV, no 2, Otto, II, no. 14, §§17–19, Brautlacht, III, c 2, §§5–9, Bortius, *De natura jur maj* c 1, §2, c 2, §16, c. 5, §9, c 6, §§1–2, Besold, *De maj* s. 1, c 1, Tulden, I, cc 11–12, Werdenhagen, III, c 2, §§7–9, Liebenthal, VII, §§3–13, Frantzken, *De pot princ.* §§19–22 and 92–101, Carpzov, *Comm. in leg reg* c. 1, s 14, c. 13, s. 1, Limnaeus, *Jus publ* I, c 10, no 14, *Capitul* p 532, nos. 48–79, Berckringer, I, c 4, §10 see also the author's *Genossenschaftsrecht*, IV, pp 216sqq [not here translated] and his work on Althusius, pp. 165sqq, nn. 124–9

Idea of the State itself as the true Sovereign

112 We may trace such a feeling in Bortius (c. 5, §9), where he describes the *tota Respublica et secundario ordines et status Regni* as the *subjectum absolutum Majestatis*, and the King, in so far as *regimen translatum est*, as the *subjectum limitatum* It may also be seen in Besold (*De maj* s 1, c. 1, §4) *nunquam censendum est totam et universam Rempublicam per Principem repraesentari; caput est, non totum corpus, et quomodo in corpore humano etiam aliarum partium functiones sunt, ita et adhuc corporis publici et populi aliqua est Majestas* (Berckringer says the same, almost word for word, I, c 4, §10.) Compare also the attempt made by Fichlau (in Conring, *Opera*, III, pp 976sqq) to interpret the doctrine of Althusius as if majesty were ascribed by him to the body of the whole association only *ratione fundamenti et radicaliter* [i e. in theory, and not in practice].

'Real majesty' ascribed to the Respublica *or* Populus

118. In Paurmeister, for example, we often find the *summa potestas*, which in the passages quoted above in n 111 he assigns to the *Respublica* or *Imperium*, also ascribed to the *populus* or *universus populus* (I, c 17, nos 1sqq, c 19, nos. 6sqq, II, c. 1, no 11). Kirchner (II, §1) vindicates 'real majesty' for the *societas populi coalita*, Boxhorn (I, c 5) attributes the majesty of the *Respublica* also to the *populus*, Alstedius (p 18) ascribes sovereignty to the *populus* or *subditi universi*, and Bortius, while he generally vindicates it for the *Respublica*, gives it equally in cc 2, 6 and 7 to the *populus* Besold and Tulden also identify the *Respublica*, as the 'Subject' of 'real majesty', with the community of the people, indeed, they even identify the *Respublica* with *omnes singuli*, when they are distinguishing it [as the possessor of 'real majesty'] from the democratic authority possessing 'personal majesty' (n. 43 supra) Limnaeus, loc cit, expressly describes the *Respublica*, which continues to remain in possession of 'real majesty' after the creation of a 'personal majesty', as being the *universitas* or *universus populus* (see supra, n 69) Werdenhagen (I, c. 6) and Berckringer (I, c. 4, §§6–10) describe the 'Subject' of 'real majesty', which they sometimes call by the name of *Respublica* and sometimes by that of *Populus*, as *collectivum* (supra, n. 67).

The particular rights involved in real majesty

114. Thus the *Respublica* or *Populus*, as the 'Subject' of real majesty, is generally held to possess (1) the right of originally appointing the Ruler, which comes into force again in the event of the extinction or forfeiture of the powers of the authorised Ruler, (2) the right of fixing and maintaining the conditions of the contract between ruler and ruled, and (3) the right of consenting to constitutional changes and alienations of territory. It is also, as a rule, held to possess (4) the right of resistance to, and deposition of, a Ruler who has broken the contract, and (5), in addition, all other rights which are reserved by special provision when 'personal majesty' is vested in the Ruler. See particularly Bortius, on the distinction between *jura regni* and *jura regia* (c 1, § 2), on the various *jura regni* which *ad ipsam Rempublicam*, or *ad populum, spectant* (c. 2), and on the several *jura regia sive regalia* in detail (c 3) See also Paurmeister, I, cc 19, 21, 22, 23 and 30, Besold, *De maj* s 1, c 1, §§5–8, c. 6, § 2, s 3, cc 2 and 7, Tulden, I, c. 11, Arumaeus, loc cit, Limnaeus, loc. cit, Berckringer, I, c 4, § 8

State property belongs to the owner of real majesty

115. Cf Besold, *De maj.* s 1, c 1, § 7, where a distinction is drawn between the 'patrimony of the King' and the 'demesne of the Kingdom' as regards the latter, *nuda proprietas est penes Universitatem populi sive Rempublicam, usufructus autem penes Regem*, and therefore there can be no alienation without the consent of the People See also Berckringer, I, c 4, § 8 the ownership of the demesne, as the *dos Regni*, is vested in the *universus populus*, but the usufruct belongs to the *imperans* Cf also Bortius, I, c. 2, § 16

The owner of real majesty as controlling the owner of personal majesty

116 This is particularly emphasised with regard to changes in fundamental law, or in the territory of the State (Besold, s 1, c 1, §§5 and 7, Tulden, I, c 11, Bortius, c. 2, §§ 14–21), and in regard to the choice of a new ruler (Bortius, c 2, §§3–13) and the deposition of a tyrannical ruler For the right of deposition of the tyrannical ruler, see Boxhorn, II, c 4, §§45 sqq and *Disquis polit* c 3, Hilliger in Arumaeus, II, no 13, c 9, Frantzken, ibid IV, no. 42, §§92–101, Brautlacht, *Epit.* VIII, c 5, Limnaeus, loc cit, Berckringer, I, c 5, and Bortius, c. 7, who argues that *contrariatur majestati, si Princeps in perniciem et ruinam Reipublicae abutitur potestate, contra quod remedium est ut resistat populus et, si opus, deponat eundem;* for since the *Princeps eo ordine, in et jure admissus est, ut salutem Reip procuraret, dissolvitur obligatio et hoc solo casu populus potior* The same general theory [which is applied to the tyrannical ruler] is also applied by Bortius to the case of a breach of *pacta expressa*

Personal majesty as a proprietary right

117 The right of the Ruler to public power and public property was often conceived as a *dingliches Recht* * Cf R Sixtinus, I, c. 1, no. 38 (*quasi propria*), Paurmeister, I, c 18, nos. 6–10 (*dominium verum et plenum* in all rights of government belongs to the People, but the *dominium utile*, the *usufructus* and the other *jura realia innominata* belong to the Ruler), Limnaeus, loc cit. (*usufructus*) According to Berckringer (I, c 4, §§6–7) the People abandons the 'exercise' of majesty *privative*, but retains the 'substance' *cumulative*, whether we regard it as retaining that substance *ratione juris et proprietatis*, or whether we apply the analogy of a case of 'letting' or *locatio* (there can be no question of 'selling' or *venditio*)†. In § 8, however, Berckringer simply says that the

* I e. not as a right arising from the obligation to him of others, but as a proprietary right belonging to him *per se*, and therefore prior to obligation

† I e the people as a whole retains the substance of majesty either in the simple sense of being owner, or in the sort of sense in which a person letting out property still retains a 'substance' though he has let out the control

two 'majesties' are related to one another as *dominium* is to *usufructus* Otto (§§ 18–19) regards the Ruler as only *administrator*

118. On the varieties in the treatment of *majestas personalis* see the author's work on Althusius, pp. 168–71.

119. The statement of Berckringer (I, c 4, § 7) is obscure He makes the people, by creating a 'personal majesty', cease to be a *persona actu*, but continue to remain a *persona potentia, immo actu, sed possibili* It is equally difficult to detect any clear meaning in § 20, where he deduces from the 'real majesty' of the *Respublica contrahens* the conclusion that the People, after erecting a Ruler, has still no Superior *realiter*, though it has one *personaliter*.

120. See the writer's work on Althusius, p. 171

The People to Grotius merely an aggregate

121. This is the conception which Grotius applies in dealing with the acquisition of political authority by the voluntary or enforced subjection of a people (I, c 3, §§ 8–13, II, c 5, § 31, III, c 8), with the alienation of political authority, or some particular political right of government or property, whether by the Ruler or the People, or by both together (II, c 6, §§ 3–14, III, c. 20, § 5), with the loss of political authority (II, c 9), with the right of resistance to that authority (II, c 4), and with the obligation of the People in virtue of contracts concluded by the Ruler (II, c. 14; III, c. 20, § 6) Cf. supra, notes 54, 66–7, 70, 89–90, 97

Grotius limits popular sovereignty

122. Cf. I, c. 3, §§ 8–9 it is a mistaken theory that *suprema potestas* always belongs to the People, for the people can alienate or forfeit its original sovereignty just as much as an individual can alienate or forfeit his liberty There is also error in the theory of those *qui mutuam quandam subjectionem sibi fingunt, ut populus universus regi recte imperanti parere debeat, rex autem male imperans populo subjiciatur* See also II, c 4, §§ 1–7, c 5, § 31, III, c 8.

Grotius on the continuity of the State

123 II, c 9, § 8 the people is the same whether it is ruled *regio vel plurium vel multitudinis imperio*, nor does it change its identity if, having been before *sui juris*, it afterwards becomes subject *plenissimo jure. Nam imperium quod in rege est ut in capite, in populo manet ut in toto, cujus pars est caput, atque adeo rege, si electus est, aut regis familia extincta, jus imperandi ad populum redit* Consequently, *non desinit debere pecuniam populus, rege sibi imposito, quam liber debebat, est enim idem populus, et dominium retinet eorum quae populi fuerant, immo et imperium in se retinet, quamquam jam non exercendum a corpore sed a capite.* For the same reason 'he who has received supreme power over a people previously free' must hold the same position in [international] conferences as that held before by the people itself *sic, vicissim, qui regis fuerat locus eum populus liber implebit.* Cf also II, c 6, § 16 contracts made with a free people are always *pacta realia . quia subjectum est res permanens .. immo etiamsi status civitatis in regnum mutetur, manebit foedus, quia manet idem corpus etsi mutato capite, et ut supra diximus imperium quod per regem exercetur non desinit esse imperium populi.*

124 He always speaks only of 'people' and 'king', and, somewhat astonishingly, he never finds room for any technical employment of the expressions *subjectum commune et proprium.*

Grotius on Aristotle's view of the continuity of the State

The manner in which Grotius sets on one side the opposite views of Aristotle* is peculiar (II, c. 9, § 8). Like other 'artificial things', he argues, the

* Gierke here refers to vol. III of his *Genossenschaftsrecht*, p 21. For Aristotle's own views on the question, 'When is a State the same', see *Politics*, III, c 3 (1276*a* 8–1276*b* 15). Actually the interpretation of these views by Grotius seems to be more accurate than Gierke's interpretation Aristotle, as W. L Newman says (vol. III of his edition, p 149), 'decides that after *any* change of constitution the State is not

State may be considered from different points of view *civitatis species una est consociatio juris et imperii, altera relatio partium inter se earum quae regunt et quae reguntur; hanc spectat Politicus, illam Jurisconsultus.* Aristotle only spoke as a student of politics, and he therefore did not attempt to solve the question of the continuance of a public liability, because it belonged to *ars altera* Grotius' mistaken conception of the argument of Aristotle (who clearly denies the existence of a public liability himself, and only leaves as an open question the appeal to legal opinion) is obvious. It is interesting, however, to notice that Grotius vindicates the 'social' [or partnership] conception of the State for jurisprudence, and the 'governmental' for political science, and that he places himself among the jurists.

The commune subjectum never active

125. Even in dealing with the question whether acts of the Ruler are binding on his successors, Grotius, although he speaks (cf. n. 89 supra) of an intervening obligation of the *civitas*, makes no use of his conception of the *subjectum commune*; he applies instead the different idea of the Ruler's having a collective authority [because he represents the collective people] which has the effect of obliging the community at large cf also n 90 supra

Externally

126 In wars, agreements and treaties of peace it is not States as such which are involved, but their sovereigns—'those who have supreme power in the State' (I, c 3, §4, II, c 15, §3, III, c 30, §2). Accordingly we often find *Rex* and *Populus liber* mentioned as alternatives (e g II, c 6, §7, c 9, §§8–9, c 6, §16 and §31, III, c 30, §§3–4), but we also find *Rex vel Civitas* mentioned as alternatives with the same meaning (e g II, c 15, §16)

Or internally

127 See supra, n 66. Grotius ascribes *dominium eminens* to the *Civitas*, cf I, c 3, §6—*dominium eminens, quod civitas habet in cives et res civium ad usum publicum* cf also II, c. 14, §7 and III, c 20, §7—*res subditorum sub eminenti domino esse Civitatis, ita ut Civitas, vel qui Civitatis vice fungitur, iis rebus uti easque etiam perdere et alienare possit.* But, here again, what he understands by *Civitas* is the community of the people, and he therefore holds that while the question of compensation concerns the relation of *Civitas et singuli*, the question of confiscation *ex justa causa* concerns only the relation of *Rex et subditi* (III, c 20, §10) Cf also II, c 3, §19, on the possible reversion of land without an owner *ad universitatem aut ad dominum superiorem.*

128 Cf I, c 3, §§8 and 11, c 4, §8, II, c. 9, §8. There may even be *reges sub populo*, but they are not true kings

129 Cf I, c. 3, §§11–15, II, c 6, §3, III, c 8, §1, c 20, §5

Grotius on rights of conquest

130 III, c 8, §1. A conqueror may also institute at will intermediate stages between the two extremes of *subjectio mere civilis* and *subjectio mere herilis.* He can also abolish the conquered State entirely, and turn it either into a province or a *magna familia* (§2). Along with his right over the *universitas*, he also acquires the *res universitatis* and its *incorporalia jura*, inasmuch as *qui dominus est personarum, idem et rerum est et juris omnis quod personis competit* It follows that, even when he leaves a conquered people in possession of the *jus civitatis*, he can take away from the *civitas*, or leave to it, as much of its property and its rights as he likes (§4). On the application of the *jus postliminii** to a people, see III, c 9, §9, and on the moral limits to the right of conquest, see III, c. 15

the same, but that the question as to the fulfilment of contracts is a separate one'. In other words, Aristotle (just as Grotius says) only makes a pronouncement on the political question, and leaves the juridical question alone, as λόγος ἕτερος

* The right of returning to a former status and resuming former privileges.

131. I, c. 3, §13: *at in regnis quae populi voluntate delata sunt, concedo non esse praesumendum eam fuisse populi voluntatem, ut alienatio imperii sui regi permitteretur*

Grotius on the People as owner of political authority

132. I, c. 3, §11, II, c. 6, §3, III, c. 20, §5. In such a case, therefore, [i e where the King is king by contract,] it is the people only, and not the king, who can alienate right over the State or any part thereof. At the same time, the people can only do so *accedente consensu regis, quia is quoque jus aliquod habet, quale usufructuarius, quod invito auferri non debet* (II, c 6, §3), and further the consent of the part of the people concerned is also necessary when it is a question of alienating a part of a State (ibid. §4). Even alienations which are necessary and advantageous do not form an exception [to the rule that popular consent is required]; but here we may take the mere fact of silence as consent (§8) The same is also true of the granting of enfeoffments and mortgages (§9). The Ruler cannot even alienate any of the lesser rights of government (*minores functiones civiles*), so that they become the inheritable rights of the recipient, unless the people expressly concurs, or tacitly gives authority by developing a customary rule to that effect (§10) The co-operation of the people is also necessary for regulations about a regency or the succession to the throne (I, c 3, §15). If the Ruler seeks to carry into effect alienations which are invalid, the people has a right of resistance (I, c 4, §10), and it also possesses this right in other cases in the last resort (ibid §11)

133. II, c 6, §7 *territorium et totum et ejus partes sunt communia populi pro indiviso* a *liber populus*, or *Rex intercedente populi consensu*, can alienate without question uninhabited parts of the territory.

Grotius on the People as owner of State property

134. II, c. 6, §§11–13, III, c. 20, §5. The principle [of the people's ownership of State-property] carries the consequence that *patrimonium populi, cujus fructus destinati sunt ad sustentanda reipublicae aut regiae dignitatis onera, a regibus alienari nec in totum nec in partem potest Res modicae* constitute no exception, except that here it is easier to argue from the people's knowledge and silence to its consent On the other hand, the king may, as *fructuarius*, dispose of the income, and he may also mortgage effectively where, and in so far as, he has a right of imposing taxes by his own action [i e if the king can tax any property by his own action to get resources, he may also mortgage that property by his own action for the same purpose]

Grotius on the possible limitations of the Ruler

135 I, c 3, §§8, 11, 16, 18, c. 4, §§12, 14, II, c 14, §2. Grotius distinguishes two sorts of limitation [on the Ruler], according as it affects (1) only the *exercitium*, or (2) *ipsa facultas*, and according, therefore, as action contrary to the limitation (1) is simply illegal or (2) is null and void. Even limitations of the latter sort [i e. limitations on *ipsa facultas*, which make any action exceeding the limits null and void] do not involve any diminution of the Ruler's sovereignty, because the annihilation of his 'faculty' proceeds *non ex vi superioris, sed ipso jure*. Nor is any division of sovereignty produced by a stipulation in favour of popular consent to laws, taxes, etc. Even the addition of a *lex commissoria*, by which the sovereignty devolved on the Ruler must in certain cases be counted as forfeit, and must therefore give way to the original sovereignty of the People, does not eliminate the exclusive sovereignty of the Ruler during his tenure.

136 The case is different, according to I, c 3, §11, where rule is only vested in the Ruler as a *precarium* [i.e. as a thing of which the use only is granted, for a period determined by the will of the grantor].

Grotius on division of Imperium

137 I, c 3, §§17–20. *Summum imperium*, although it is *unum ac per se indivisum*, is none the less divisible into *potentiales* and *subjectivae partes*, and there is an actual *divisio summitatis* between king and people if the people, in the fundamental contract, has reserved some of the rights of government, or has reserved a power of enforcement [of the conditions, or some of the conditions, of the contract] Cf I, c 4, § 13· there is a *jus resistendi* if the king, in a case of divided *imperium*, encroaches on 'the part belonging to the people or senate'.

138 Cf vol. IV [of the *Genossenschaftsrecht*, not here translated], p 217 n. 44, on Lampadius and Scharschmidt cf also the author's work on Althusius, p 175 n 157

139. Cf ibid. pp 175–6.

The views of Catholic writers on the natural rights of the People against the Ruler

140 F. Victoria (III, no 7) ascribes original sovereignty to the *Respublica*. *Causa vero materialis, in qua hujusmodi potestas residet, jure naturali et divino est ipsa Respublica, cui de se competit gubernare seipsam et administrare et omnes potestates suas in commune bonum dirigere* He argues that, even after the transference of this sovereignty, the Ruler is still bound by his own laws, because he is himself *pars Reipublicae*, and his laws are to be regarded 'as if they had been passed by the whole *Respublica*' (no 23) But he expressly identifies this *Respublica* with the multitude, which is incapable of exercising political authority itself (no 8); he places the king *super totam Rempublicam*, and thereby also *super omnes simul* (no. 15), and he thus makes the active 'person' of the State always resident in the Ruler (cf also no 11)

Vasquez ascribes to the *populus* both original sovereignty, and, in cases of doubt, a right of co-operation in legislation and alienations of territory, which arises from a reservation to be supposed in the act of transferring original sovereignty (cc 42–3 and 47), but he describes *ipsa Respublica* as the 'Subject' of a right of resistance to a monarch who breaks his contract (c. 8)

According to Soto, the *Respublica* has the *jus seipsam regendi*, but 'by divine institution' it transfers that right—retaining however (along with other rights) the right of deposing a monarch who has become tyrannical ['in exercise'] The *Respublica*, which is really nothing more nor less than the sum of *omnes*, is incapable by itself of exercising its sovereignty, and only by transferring sovereignty does it become a body which has also a head and is therefore capable of action The result is that the Ruler *non solum singulis reipublicae membris superior est, verum et totius collectim corporis caput, totique adeo supereminens, ut totam etiam simul punire possit* (I, qu 1, a 3, qu 7, a 2, IV, qu 4, a. 1–2). Cf Covarruvias, I, c 1, and Bellarmine, *De laicis*, c 6 (*Respublica non potest per semetipsam exercere hanc potestatem*).

Molina definitely supposes two 'persons' in the State—the People and the Ruler. He reserves the name of *Respublica* for the community of the People, although he admits that the Ruler possesses sovereignty. The *Respublica*, he argues, originally has all authority (II, d 22, §9) it transfers it *secundum arbitrium* and on such conditions as it thinks fit (II, d. 23, §§ 1 sqq); and it recovers it, by right of reversion, if the Rulership be vacated or forfeit (V, d. 3). It preserves, in cases of doubt, the right of approving laws (II, d 23, §§6–7)· it also preserves the right of property in the *bona Regni*, so that the Ruler cannot alienate any of them, just as he cannot divide the kingdom or surrender it to foreigners *non consentiente Republica ipsa*, or, again, alter the constitution or the succession to the throne (II, d. 25). The *Respublica* has a right of resistance to tyrants; it can, *quoad capita, convenire*, and depose or

punish the tyrant 'by the express will of its whole body' (III, d 6, v, d. 3, §2). None the less, *Rex est superior tota Republica* [within the terms of the authority granted to him], and he is subject to no real *jus deponendi*, since (1) the *Respublica* can only proceed against him when he 'assumes a power not granted to him', and (2) when he does so, and thus acts outside the terms of the 'grant', neither he nor the people is *Superior* (II, d 23, §§8–10).

Suarez regularly describes the *communitas, populus, totum corpus*, or *hominum collectio*, as the 'Subject' of original sovereignty, and also of the rights of transferring and recovering that sovereignty (III, cc 2–4) and of the reserved rights of the people which are never transferred at all (III, c 9, no 4, IV, c 19, V, c 17), and he opposes this Group-person, as the *Regnum* or *Respublica*, to the Ruler Accordingly he terms the contract of subjection a *pactum inter Regnum et Regem* (III, c 4, no 5), he speaks of a *consensus Regni* to laws (IV, c. 19, no. 6), and he vindicates for the *Regnum* or *tota Respublica* a right of insurrection against a king who has become a tyrant 'in exercise', arguing that, though the people has transferred to him a real ownership of political authority, it has added the condition *ut politice non tyrannice regnet*— so that, while in his essence *Rex superior est Regno*, a contingency may arise in which *tota Respublica superior est Rege* (III, c 4, no 6, c. 10, nos 7–10, *Opus de triplici virtute*, pp 1055–6)

See, in addition, nn 62 and 67 supra, on the 'collective' conception of the personality of the people in the writers mentioned

The Ruler limited by the contractual rights of the People

141 Cf Waremund de Erenbergk, *De regni subsidiis*, c 11, p 150; Bornitius, *De maj* c. 9 (*leges fundamentales et pacta cum populo*), c 13 (where it is argued that the administration of parts of majesty may be devolved, so that an *imperium moderatum* takes the place of *summum imperium absolutum*), and *Part* pp. 42–3 and 102sqq , Fridenreich, cc 18 and 29 (on the possible limitation and restriction of the exercise of the supreme power by certain *pactiones*), Keckermann, I, c 33, pp 531–2 (on special pacts with subjects, which restrict but do not abolish monarchy), Busius, II, c 7 See also Molina, II, d 23, and Suarez, III, c 4, no 5, c 9, no 4, IV, c 17 (the Ruler may be limited in the exercise of supreme power, in legislation, in taxation, etc , by a *translatio sub conditione*, for such a conditional transference is a *conventio inter communitatem et principem, et ideo potestas recepta non excedit modum donationis vel conventionis*)

Division of the mixed constitution as affecting sovereignty

142. We find this dualism in Arnisaeus (*Polit* c 8, §§38sqq ; *De rep.* II, c 6, s 1, *De jure maj* II, c 1, §1) 'majesty' is *unum individuum, non individuum. unum potentiale, non essentiale* it contains 'parts', viz the 'rights of majesty', and though it cannot, *simul sumta cum omnibus suis partibus*, belong to a number of persons *secerni, et divisim inter plures distribui, possint.*

The mixed constitution is interpreted by most of its adherents in the same sense of a *real* [and not merely conceptual] division of powers. cf for example, Grotius in n. 137 supra, Heider, pp 982sqq , Werdenhagen, II, c 25, Limnaeus, *Jus publicum*, I, c 10, Schönborner, I, c 16, Keckermann, II, cc. 4–6, Liebenthal, VIII, qu 1 , Berckringer, I, c. 5, §7 and c 12, §§15–21, Felwinger, *Diss.* pp. 417sqq. But the 'person' of the Ruler still remains a divided 'person' when the essence of the mixed constitution is held to consist merely in a division of majesty into *ideal* [or conceptual] parts, cf. Paurmeister, II, c. 1 (cf vol IV of the *Genossenschaftsrecht* [not here translated], p. 218); Besold, *De statu rep. mixtae*, c. 1, Tulden, II, cc. 16–17, Carpzov,

Comment in leg reg c 13, s 9, nos. 28–31 We find, however, in Besold, op cit , and still more decidedly in Frantzken, *De statu reip mixto*, an approximation to the view that the partners who share supreme power only constitute the person of the Ruler when they are taken *conjunctim* Cf also Suarez, III, c 4, no 5, IV, c 17, no 4 and c. 19, no. 6 where the king needs the *consensus Regni in publicis comitiis* for his laws, the 'supreme legislator' is not the king by himself, but *Rex cum Regno.* Other thinkers only speak vaguely of a common capacity for the rights of majesty cf Busius, II, c 6, and also L de Hartog, *A Dutch Writer on the State at the Beginning of the Seventeenth Century* (in an offprint from *Nieuwe bijdragen voor rechts-geleerdheid en wetgeving*, 1882), pp 24sqq and 33

143 Bodin, I, c 8 and II, c 1, and especially the argument (in nos 85–99) that any constitutional limitation of the true Ruler by the rights of the *universitas populi* is unthinkable, because it at once makes the *universitas populi* itself the Ruler

144 Bodin, VII, c 2, nos 640–1 (where there is a comparison of the *Respublica* to a minor) Cf also vol IV of the *Genossenschaftsrecht* [not here translated], p 249 n 156

145 Gregorius, although he has a doctrine of the Sovereignty of the Ruler which makes it single, illimitable, indivisible, and irresponsible (I, c 1, §9, V, c 1, §3, VI, cc 1–3, XXIV, c 7, XXVI, c 5, §§24–5 and c. 7), none the less makes a sharp division between *bona Reipublicae* and *bona patrimonialia Principis*, and he will only describe the former as being, at the very most, *quasi propria Principis* (III, cc 2–3 and *Syntagma*, III, c 2, §§8–10) He also allows the possibility of a limitation of supreme power *per legem electionis* (III, c 7). *Even the absolutists suppose a personality of the People*

Bornitius, again, while he assigns the 'person of the State' decisively to the Ruler—by whom alone *Respublica statum adipiscitur et conservat* (*Part.* p 45, *De maj* c 5), and who stands above the People, even when they are regarded as a community, in virtue of being the 'Subject' of a single and indivisible majesty (*Part.* pp 47sqq., *De maj* cc. 3 and 11)—at the same time refuses, like Gregorius, to recognise the Ruler's right of property in *bona Reipublicae* (*Part* pp 70sqq), and regards limitations of absolute power as possible (supra, n 141).

Keckermann goes to the length of allowing the possibility of resistance and deposition even against the *absolute Imperans*, though he makes the exercise of these rights more difficult in that case than it is against the *Monarcha certis pactis et conditionibus assumptus* (I, c 28, p 431)

According to Claudius de Carnin, *Regia potestas* and *Reipublicae potestas* are identical (I, c 10), inasmuch as by natural law the *Respublica* necessarily transfers, without any reservation, the whole of the power which rested originally in itself (I, c 9), but the *acceptatio populi* continues to be necessary for legislation (I, c 3)

Barclay [unlike these thinkers] recognises no rights of any description as belonging to the People According to his argument every true monarchy is absolute, and its existence is incompatible with any limitations, or any division of power, imposed by fundamental law (II, IV, V, c. 12) All the rights of the People are transferred, and thereby cease to belong to the People (IV, c 10, VI). *universa negotia Reipublicae demandantur Regi* (IV, c 25); there is never any right of resistance or deposition (III, cc 4–16, V, cc. 7–8) In Barclay, however, there is no question of any theoretical construction of a State-personality [i e he does not get beyond the conception of the personal

king to a conception of the impersonal '*persona Civitatis*', which might have involved him in problems of the relations of the king to this *persona*].

Arnisaeus on the Ruler and the societas of the ruled

146. Cf *Polit* c. 6, *De rep* I, prooem §§4sqq. and c. 5, s. 3–5. He thus assumes that, when the form of the State is changed, the *Respublica* disappears but the *Civitas* remains, and he states the question which Aristotle raised in connection with such changes* in the form, '*Quatenus acta Reipublicae obligent Civitatem?*' His conclusion is that 'contracts made by the *Respublica* only' do *not* bind 'the whole *Civitas*' on the other hand 'contracts made by the whole people', and 'agreements made and expenses incurred for the welfare of the *Civitas*' (in regard to which the 'tacit consent of the people' is to be assumed) continue to hold good 'if the *Respublica* disappears'. He also contrasts the personality of the People with that of the Ruler in other connections, and, more particularly, he refuses to include within the scope of the Ruler's 'majesty' the right of property in the territory and belongings of the State (*De jure maj.* III, c. 1). But he entirely excludes the People as such from all the rights of the *Respublica* (*De rep.* II, c 2, s 5, c 3, s. 8; *Polit* c 14; *De auct principum in populum*, cc 2–3, *De jure maj* I, cc. 3, 6), and he accordingly holds that where a monarch is limited by the constitutional rights of the People, there is no longer any question of a true monarchy, but only of a *forma mixta* (*De auct* etc c. 1, §§4sqq , *De jure maj.* I, c 6). It follows that the *Respublica*, which includes and connotes the whole authority of the State (*De rep* I, c. 5, s 3), is identical with the Ruler, and the 'person' of the *Respublica* can therefore be also expressed by a personification of his *majestas* or *dignitas* (*De rep* I, c. 5, s. 4, *De maj* III, cc 1 and 3) More especially, the immortality of his *dignitas* serves as a means of securing the continuity of the *Respublica* in the event of a change in the line of succession 'So far as the rights of majesty and the *status imperii* are concerned', the successor to the throne is bound by the contracts (though not by the decrees) of his predecessors, where such contracts have been made *nomine dignitatis, et pro Republica*, in regard to matters appertaining to the dignity itself, but 'in matters appertaining to the fisc' [i e to his own private treasury, as distinct from the public funds], he is only responsible as heir (*De jure maj* I, c 7) Between the 'person' of the State or *Respublica*, as thus conceived, and that of the People, there may be an *obligatio inaequalis*, but there can be no really effective contractual relation (ibid. c 6)

Hobbes' version of contract

147. *De cive*, c. 5, *Leviathan*, c. 14, c 17. *tanquam si unicuique unusquisque diceret Ego huic homini, vel huic coetui, auctoritatem et jus meum regendi me ipsum concedo, ea condicione, ut tu quoque tuam auctoritatem et jus tuum tui regendi in eundem transferas* Cf the author's work on Althusius, pp. 86sqq , 101sqq., and for different conceptions see pp 341sqq.

Hobbes rejects the idea of the People as a 'person'

148 *De cive*, c 6, §1, c 7; *Leviathan*, c 19 In particular he argues that the assembled people, even when it wishes to retain supreme power, cannot continue to be a 'person' unless it immediately transforms itself into a *concilium* regularly meeting and deciding questions by a majority-vote, which involves a devolution by all and single of their whole personality, through a mutual contract, upon the democratic Ruler as *una persona* (*De cive*, c. 7, §§5–7). In an aristocracy, the constitution of a *curia optimatum* to rule as 'a single person' means that the people immediately 'ceases to exist as a single person' (ibid §8), and is 'at that moment dissolved' (§9), 'being no more

* See supra, n. 124.

a single person, but a dissolute multitude' (§ 10). Similarly, if a monarch be chosen, *populus statim atque id factum est persona esse desinit* (§§ 12, 16).

Hobbes refuses to admit a contract of Ruler and People

149. *De cive*, c 6, § 20, c. 7, §§ 7, 9, 12, 14, 17; *Leviathan*, c 19 The monarch in a monarchy, the Senate in an aristocracy, and the majority of the people in a democracy, are all *omni obligatione liberi*, they are not bound by any contracts made with individual subjects or with the whole body of subjects. they are not even pledged by any oath they may have taken. They cannot therefore do injustice to their subjects, either as individuals or as a whole. Any reservation of the rights of the People in a democracy, by means of a contract made at the time of the institution of the Ruler, is inconceivable, because the People was not a person before the establishment of the principle of majority-rule, and the only contract which was possible at that time was merely a contract between individuals and individuals A similar reservation in an aristocracy, or a monarchy, would be null and void, because the people receiving the promise [that its reserved rights will be observed] disappears as a person with the institution of the aristocratic or monarchical Ruler, 'and when a person disappears, all obligation to that person disappears also'. A contract between the Ruler, *after* he has been instituted, and the People, is impossible, because all that then remains over against the sovereign is merely a 'dissolute multitude' Nor can any legal nexus of any sort exist as between the Ruler and his individual subjects, because the will of individuals has been merged entirely in the sovereign will

150 *De cive*, c 5, § 11, c 6, §§ 4–20, c 7, c 12, §§ 1–7, c 13, c 14, §§ 20–33, *Leviathan*, cc 18, 19, 21, 23, 30

151. *De cive*, c 6, §§ 17–19, c 7, §§ 4 and 15–17, c 12, § 5, *Leviathan*, cc 18, 29

152 See supra, nn 84, 86, 87.

Sovereignty to Hobbes a physical fact

153 Hobbes' account of the similarity and difference between the monarchical and the republican sovereign illustrates particularly how much he identifies the 'personality' of the Ruler with the physical substance of a man or a body of men The republican sovereign only really exists for him as long as it is actually in session in the interval it sleeps, and this sleep becomes death if the right of meeting at its own discretion be lost. Cf *De cive*, c 7, §§ 6, 10, 13 and *Leviathan*, c 19, and especially *De cive*, c 7, § 16, with the acute deductions in regard to temporary monarchies which are derived from this principle.

The Sovereign as plenary Representative

154 *De cive*, c. 5, §§ 6–11, *Leviathan*, c. 17. This contract is more than a 'consent or concord' it is a real union of persons, *in personam unam vere omnium unio*. By it 'the wills of all are reduced to one' . *ut unus homo vel unus coetus Personam gerat unuscujusque singularis, utque unusquisque auctorem se fateatur esse actionum omnium, quas egerit Persona illa, ejusque voluntati et judicio voluntatem suam submitteret*

155. *De cive*, c. 5, §§ 9–10, 11, c 6, § 1, *Leviathan*, cc 16–18, 22. Hobbes declares absurd the opinion of those who say, 'of Kings bearing the Person of the State', *quod etsi singulis majores, universis tamen minores sunt; nam si per universos intelligunt Civitatis Personam, ipsum intelligunt Regem, itaque Rex seipso minor erit, quod est absurdum, sin per universos multitudinem intelligunt solutam, singulos intelligunt, itaque Rex, qui major singulis est, major quoque erit universis, quod iterum est absurdum.** Most thinkers are, however, in Hobbes' view, unable to see how *Civitas in Persona Regis continetur* (*Leviathan*, c. 18)

* See the statement of this argument in the English version of the *Leviathan*, c. 18, at the beginning of the third paragraph from the end of the chapter.

The People without a Ruler a mere multitude

156. Hobbes is never tired of drawing out the distinction between a community constituted as a person and 'a dissolute multitude to which no action or right can be assigned', or of describing the people without a Ruler as a mere 'multitude' cf *De cive*, c. 6, §§1–3 and 20, c 7, §§5, 10, 16, 18; *Leviathan*, cc 16, 18, 19 He will not even allow the name of 'people' to be applied to such a body, and he remarks (*De cive*, c 12, §8) that it is a mark of revolutionary opinion *quod homines non satis distinguunt inter populum et multitudinem* The 'people' is a unity with a single will and activity the 'multitude' is not. The 'people' rules in every form of State, and even in a monarchy (for 'the people wills by the will of one man'): the 'multitude', in all forms, means the subjects *In Democratia et Aristocratia cives sunt multitudo, sed curia est populus; et in Monarchia subditi sunt multitudo, et (quamquam paradoxum sit) Rex est populus* If, following the vulgar use of language, we call the masses by the name of 'people'—if we speak of (what is totally impossible) a rebellion of the *civitas contra regem*, and describe the will of discontented subjects as 'the will of the people'—we are invoking, *sub praetextu populi, cives contra civitatem, hoc est multitudinem contra populum.*

The Ruler as soul of the body politic

157 *De cive*, c 6, §19 the usual comparison of the Ruler to the head is false, a comparison of him to the soul is the only proper comparison, because the soul is the instrument of the will, and it is through the instrumentality of him *qui summum habet imperium, et non aliter*, that 'the State has will', *et potest velle et nolle*. The chief council is a better analogy to the head; cf *Leviathan*, Introduction and c 19

Hobbes on the personality of the State

158 Cf supra, notes 100 and 101; *De cive*, c 5, §9, §12, c 6, §1, c 12, §8, *Leviathan*, cc 17–19 Hobbes' very definition of the State already includes the attribute of personality In the *De cive*, c 5, §9 (after an account of the institution of a 'civil person' by means of a union of wills, and an explanation of how this 'person' differs from individuals, and even from *omnes simul, si excipiamus eum cujus voluntas sit pro voluntate omnium*) we get the definition *Civitas ergo (ut eam definiamus) est persona una, cujus voluntas ex pactis plurium hominum pro voluntate habenda est ipsorum omnium, ut singulorum viribus et facultatibus uti possit ad pacem et defensionem omnium.* A similar definition also occurs in the *Leviathan*, c 17. Here, after giving an account of the contract made at the time of the State's foundation, he continues, *quo facto multitudo illa una Persona est, et vocatur Civitas et Respublica, atque haec generatio est magni illius Leviathan vel—ut dignius loquar—mortalis Dei, cui pacem et protectionem sub Deo immortali debemus omnem.* Then follows the definition—'A State is one person, of whose actions a great number of men have made themselves authors by mutual agreements one with another, to the end that he should use the power of them all at his own will for peace and common defence'.

Contemporary views similar to those of Hobbes

159. About the same time as Hobbes (1642) Graszwinkel developed an absolutist theory of indivisible and illimitable 'majesty' (*potestas una, summa in se, et absoluta*) which held the same position in the State as God in the Universe or the soul in the body, and excluded any independent right in any other part of the State [cf n. 93 supra]. But Graszwinkel failed to attain the conception of a single and homogeneous State-personality, and his failure was due not only to the theocratic basis from which he started (cc. 1–3), but also, and indeed primarily, to his dualistic conception of the nature of 'majesty'. He maintained the distinction between 'real' and 'personal' majesty; and all that he contended was that the one *might* [on occasion] exclude the other E.g. 'real majesty' exists to the exclusion of 'personal

majesty' (*a*) in a Republic, (*b*) in a monarchy during an interregnum, (*c*) when it appears as a source of fundamental laws, and (*d*) where the monarch is *Rex sub conditione* Conversely, the 'personal majesty' of a *true* king includes 'real majesty', which thus disappears as a separate entity (cc. 10–11)

Salmasius, in the *Defensio Regia* of 1651, is already obviously under the influence of Hobbes. Like Hobbes, he regards the *universus populus* or *universitas*, in a true monarchy, as a mere aggregate He holds the original rights of the people to be entirely merged in the sovereignty of the king, arguing that these rights only belonged to *omnes collective sumpti*, i e to the people as a *concio*, and that the king has taken the place of such *concio* (*unus instar concionis*) He depicts the king as the one representative of the unity of the people (*unus instar totius populi*), and he holds that there is no community of the people confronting him which is capable of exercising any rights (cf esp c. 7). Salmasius, however, does not attempt to deduce any conception of the personality of the State from these ideas

§15. THE NATURAL-LAW THEORY OF ASSOCIATIONS [*DIE ENGEREN VERBÄNDE*]

The position of the Family in political theory

1 Bodin, who includes in his initial definition of the State the fact that it is composed of families (I, c 1, no 1), vigorously defends against Aristotle* the propriety of making the theory of the Family a part of Political Science, on the ground that the family is both a fundamental element in and an 'image' of the State (I, c 2), and he proceeds at once (I, cc 3–5) to treat in detail of the three powers which exist in the family [the power of the husband, that of the father, and that of the master] Arnisaeus takes a similar line, *Polit* cc 2–5 and *De rep.* I, cc 1–4. see also Danaeus, I, c 3, Cruger, *disp.* II, Heider, pp 32sqq., Velstenius, *dec.* II–III, Bornitius, *Part* pp 38sqq , Liebenthal, *disp* II–IV, Olizarovius, lib I

On Besold's treatment of the three family societies and the general family-community which they compose, see vol IV of the *Genossenschaftsrecht* [not here translated], p 13 Gregorius does homage to a similar point of view (I, c. 2), but he does not discuss the Family in any detail Conring also holds that it is only *societates domesticae* and the State which have their origin in Natural Law: cf. *Diss. de republica*, Op III, pp 763sqq , and *De necessariis civitatis partibus*, ibid. pp. 748sqq

2 This is the line taken by Bodin, I, c. 6, Arnisaeus, *Polit* c 6, *De rep* I, c. 5, Cruger, *disp* III; Heider, pp. 25sqq , Velstenius, *dec.* IV–V, Bornitius, *Part.* p. 40, Liebenthal, *disp* V, Olizarovius, lib II–III

3. Bodin first treats of corporations in his third book, under the head of

* Aristotle, in the beginning of the *Politics*, where he is controverting the *Politicus* of Plato, distinguishes the theory of the Family from that of the State Later, however, in the course of Book I and the beginning of Book II, he deals largely with the theory of the Family as a part of the theory of the State.

The treatment of groups as institutions of administrative law

administrative law. Here he describes, as *Reipublicae partes ac veluti membra singula, quae principi Reipublicae quasi capiti illigantur*, first the Senate (c 1), then the officials (c. 2) and the administrative boards (cc. 3–6), after that the corporations (c. 7), and finally the Estates (c 8).

Gregorius similarly brings under the head of administrative law his account of the advantages and dangers of corporations (*De rep.* XIII, cc 2–4). He regards corporations as being mere institutions of positive law after the State has once been formed—although, in the same context, he refers to the *natural* development of an ascending series of groups [while the State is being formed] (ibid c 2, §2)

Arnisaeus, in his comprehensive treatise on politics, only devotes a few scattered remarks to local communities and corporations at the end of his theory of the *subditi majestati* (c. 12, p 133) Bornitius simply treats associations as subdivisions of Estates (*Part.* p. 72), and many other political theorists similarly consider local communities and corporations merely as political divisions of subjects—cf. Heider, pp 268–71, Hoenonius, *disp.* 2, §§52–7, Velstenius, IV, qu 8–9; Busius, I, c. 13 (in a context in which the family has also been previously treated in cc. 10–11, and the institution of clientship in c. 12); Kirchner, *disp* XIV, Liebenthal, *disp* V, §§1–78 We often find associations completely omitted by political theorists (e g Cruger), and still more often by the theorists of natural law (e.g. in the treatises cited above, §14 n 2)

4 This is particularly the case with the ecclesiastical theorists of Natural Law, and more especially with Molina and Suarez.

Bodin's classification of collegia

5. Bodin, distinguishing *collegia rerum divinarum ac publicae pietatis causa* from *collegia rerum humanarum*, divides the latter into those which have 'jurisdiction', and those which have not. In the former category of these secular 'colleges' he includes only 'magistrates and judges', in the latter, 'colleges' for the *educatio juventutis*, and *medicorum, scholasticorum hominum, mercatorum, opificum, agricolarum sodalitia* [such colleges thus being either educational, or professional, or occupational]—see loc. cit no 330.

Later, in dealing with the 'powers of colleges', he gives pre-eminence to the 'colleges of magistrates and judges', as being *praecipua*, because they *non solum collegas singulos ac collegii totius minorem partem, sed caetera quoque religiosorum et opificum collegia, pro jure suae potestatis moderantur et coercent* These corporate bodies of judges and magistrates are distinguished from other 'colleges', which are only concerned with their own particular *negotia communia*, by the fact (*a*) of their handling *tum sua tum aliena negotia*, and (*b*) of being constituted *potius aliorum quam sua causa*. But they too 'must rightly and duly administer law for their own members, individually as well as collectively', before they assign rights to others. Bodin adds one qualification The right of a college to exercise jurisdiction itself over its members is a right which is only to be recommended in the case of the 'most prudent' colleges· for other colleges, the jurisdiction of superior colleges and of the Prince is preferable (nos 332–3).

Bodin on the rights of private 'colleges'

6 Bodin argues that these other colleges [i e colleges other than those of magistrates and judges] *jurisdictione et imperio vacant*, and have only a 'right of coercion and moderate castigation' within the limits of their statutes: even Frederick II assigned no more power to Rectors of Academies and headmasters of schools Where *collegia religionis causa constituta* are in question, the *judex ordinarius* has to decide how far a penalty or sentence of expulsion

imposed by a college is admissible Any rule to the effect that disputes between members must only be brought before the college has no validity *in crimine et judicio publico*, and *in privatis judiciis* the decision of disputes by a college is only valid when it takes the form of an 'arbitral award'—and even so it must be passed by a unanimous resolution. The summoning of a meeting by the senior members or officers binds nobody to appear, unless the summoner *imperium habet* failing that, recourse must be had to the government in order to issue a binding summons, but only moderate penalties can be imposed on those who absent themselves, even when such a summons has been issued *Collegia* and *universitates* may issue edicts, *salvis legibus*, but they must not even discuss what is forbidden to them by law, or anything that is not included in the sphere of their corporate affairs (nos 333–7).

Bodin on corporate property

7. Loc cit. no 331 (*victus communis* is no more necessary than an *aerarium commune*) see also no 332 (a 'college' can only acquire a capacity of inheritance by a special privilege to that effect [cf the modern French rule which requires administrative authorisation for the acceptance of a gift or legacy by an *établissement publique*], the idea of a corporation does not necessarily require a capacity of inheritance, or even of acquisition)

Bodin on the offences of corporate bodies

8 Although *universitas non potest peccare, immo ne consentire quidem*, Bodin holds that, in consequence of the identification of the majority with the whole body, penalties may be properly imposed on the corporate body (such as withdrawal of the right of meeting, cancellation of privileges, fines, and confiscation of property), if an offence has been committed after proper discussion and decision in due corporate forms On the other hand, he would spare innocent individuals from incurring penalties which affect their body or life—or even their property, so far as it is possible to distinguish their property from that of the corporation For the rest, basing himself on a full review of historical facts and on political considerations, he advises the following of a just mean between severity and excessive clemency (nos 337–42)

Gregorius Tholosanus on the same theme

9 Gregorius, after speaking of the origin and the various species of ecclesiastical and secular corporations, and after limiting drastically the scope of *collegia licita* (*De rep* XIII, c. 2), proceeds to discuss in his next chapter (c 3), with an unusual wealth of detail, the offences of corporations (especially those of monopoly and heresy), and the three *remedia* which the sovereign can apply in dealing with such offences They are (1) *reformatio institutionis* (by way of changes, prohibitions, visitations and penalties, §§2–15), (2) abolition (§§15–21), and (3) a rule to the effect that *non permittendae sunt facile novae religiones aut collegia* (c 4) In the course of this argument there is no mention of any legal limits on the sovereign power Cf also XIII, c 19 (on offences of fraternities and their suppression) and XXIII, cc. 3–4 (on 'factions and conspiracies, and their remedies') On the juristic treatises of Gregorius, see above [vol IV of the *Genossenschaftsrecht*, not here translated], p 60 n. 2, p 65 n 17 and p 91 n 90

Bornitius' theory of corporate bodies

10. Bornitius demands that 'for the preservation of the State', persons should be divided into three Estates (*Part* pp 68sqq), and these Estates should be subdivided *in alias partes, quae collegia dicuntur, ut eo rectius et facilius sua munera expedire possint* (p. 72). Each of these colleges—including, in the spiritual Estate, those of priests, professors, doctors and the like; in the political, those of magistrates, judges and councillors, and in the private

Estate, those of agriculturalists, merchants and artisans—is *auctoritate Principis factum et concessum.* The colleges, when formed, are then united to form a *corpus*, and a number of *corpora* are finally united to form a *universitas* * For the most part they have *suam politiam in jure, legibus, privilegiis, pactis, suaque administrandi forma*, but the rights of *collegia in statu privato* [i e in the third or 'private' Estate] belong only to the sphere of private law as a *jus civium speciale* (p. 93), and such private colleges, like families, can only have a *politia privata* (p 105) Cf *De maj* cc 14–39 (where it is argued that a grant by the State is always necessary to justify collegiate self-government, *jurisdictio*, the choice of officers, *jus comitiorum*, the right of taxation, and the like)

Arnisaeus on corporate bodies

11 Arnisaeus (*Polit* c. 12), at the end of his theory of the *subditi majestati*, speaks of their division into certain classes, *ut scilicet commode gubernari per jussa et imperia majestatis possint.* In this connection he discusses *collegia, corpora* and *universitates* on the basis of Bodin's scheme he rejects entirely any toleration of associations without 'the consent and the confirmation of the State', but he allows to colleges a power of making rules *de rebus suis et in collegas*, and also, by authority of a special grant to that effect, a *jurisdictio in collegas* Similarly, in his *de jure majestatis*, he interprets all corporate authority as the result of a 'concession' made by the State, except in so far as it is merely the exercise of a power to enter into contracts or of other rights at private law cf II, c 2, §§8–9 and III, c 7, §10.

Busius on corporate bodies

12 This is the argument, essentially based on Bodin, which we find, e g. in Velstenius, *Dec.* IV, qu 8–10, Heider, pp 268–71, and Liebenthal, *Disp.* V, §§1–78 Busius takes a more independent line he starts by distinguishing the State, as the all-embracing *universitas*, from a *universitas* such as a local community or a *collegium* (I, c 3, §3), and he then proceeds to treat particularly of *collegia et corpora*, which he considers to be identical (I, c. 13). He defines a corporation as *universitas plurium civium, qui in certum aliquem finem contrahunt societatem ad similitudinem civitatis* he refuses to tolerate any other associations than those which are authorised by the State he recommends an extreme prudence, which will allow only useful corporations, will admit no discussion of public affairs, will only recognise 'statutes' [or by-laws] as 'private agreements', and will permit only private, but not public, associations He also refuses to allow any liberty of meeting. Cf Hartog [as cited in §14 n 142], pp. 15–16 and 20–1

18 Cf supra [vol IV of the *Genossenschaftsrecht*, not here translated], pp 11sqq

14 Cf e.g. Oldendorp, *Isagoge*, I, p 181, Winkler, V, c 2 and c 4, where a distinction is drawn between *respublica majestatis* and *respublica municipalis* Winkler argues that 'majesty' has, 'of itself and in its own right', the whole of the authority of government, but he adds that *conceditur etiam magistratui provinciali aut municipali interdum, ut pro modo jurisdictionis sibi commissae legem ferat, sed haec omnia precario et indultu majestatis, non jure proprio.*

Ecclesiastical writers unfavourable to Groups

15 In this sense we find Covarruvias arguing (*Pract qu* I, c. 4) that the 'supreme jurisdiction of the king' (which he calls the '*Majoria*') excludes any independent right of nobles, or of *Civitates*, if the king himself takes action It is only when the king fails to make provision, or is prevented from doing

* Does this mean that the colleges in any one Estate form a *corpus*, and these *corpora* in turn form the *universitas Regni*? Bodin has a somewhat similar view of the relations of *collegium, corpus* and *universitas*; but his *universitas* is only a local community (cf pp 64–65 supra).

so, that a *universitas* can appoint a *Rector* for itself Molina (v, d. 3, §§3–5) ascribes all *jurisdictio* to the *tota Respublica*, and therefore to the king, with the result that magnates, towns, and the like, can only have a 'derivative jurisdiction' cf. II, d 666, and Lessius, II, c 33, dub 2, on the right of taxation.

16 Suarez (I, c 8) divides *potestas praeceptiva*, which can issue commands, into *potestas dominativa* (or *oeconomica*) and *potestas jurisdictionis* (or *politica*) The former may be found even in an 'imperfect community' [e g the Family], for (*a*) the father has [naturally] a *potestas dominativa* over his child, and (*b*) such power may also arise from contract—either under natural law, through an agreement of marriage, or under positive law, through voluntary entrance into a relation of service The *potestas jurisdictionis* is confined to the 'perfect community'. Only a 'supreme head' can have the legislative authority on which a *potestas jurisdictionis* follows, and an *inferior* can only exercise such authority within the limits in which it has been 'communicated to him by the head'

Suarez regards all real authority as belonging to the State

17 According to Suarez (III, cc 2–3, 9) legislative authority, in the sphere of *leges civiles*, belongs only to sovereigns. This means that it belonged originally to the People, and has subsequently come to belong either to *Reges supremi* (and, in addition, other 'princes without a superior', and territorial princes subject to the emperor who have been duly enfeoffed as sovereigns), or to sovereign republics *Per contra*, according to Book III, c 9, nos. 16–21, the 'statutes' [or by-laws] of 'communities' have inherently nothing of the nature of *lex* The 'statutes' of *civitates minores* [*civitas* being here understood to signify an Italian city of the mediæval type], in the form in which they are recognised by Bartolus,* are either mere *pacta*, or *praecepta humana temporalia, sicut sunt praecepta patrisfamilias in domo sua*, and even the enactments of *civitates maximae* and *magnae* (species which ought not properly to be distinguished) are really either *pacta*, or (as Baldus holds) simply the expression and outcome of *jurisdictio* The real question [when we are discussing the legislative powers of a municipality or *civitas*] is whether (1) the *civitas* is a 'free people', and, as such, *retineat in se aliquam potestatem supremae reipublicae et per illam se ipsam gubernet*, or (2) *illam* [sc *potestatem*] *simpliciter transtulerit in aliquem principem, vel quolibet alio justo titulo* [*potestas illa*] *translata sit.* It is only of the former of these two alternatives that the *Lex* '*omnes populi*' speaks The instant a city is 'subject to some supreme Prince', it can no longer make laws *ex potestate propria* At the most—and then only by virtue of a reservation made by itself at the time of 'transference', or as the result of a later 'concession' made by the sovereign—it is able *statuere de rebus ad suam peculiarem gubernationem et administrationem pertinentibus* In other respects [i e apart from these particular matters] it needs the 'confirmation of the superior' What is true of cities is similarly true of provinces, and particularly of *corpora mystica.*

Suarez on the rights of municipalities

A similar view appears in I, c 8, no. 5 and II, c 1, nos. 8–10 Cf also VI, c 26, nos 4–25 *magistratus civiles aut respublicae inferiores et civitates subjectae* can never establish any rule which runs contrary to the *jus commune* of the State, the *Superior*, on his side, can abrogate even the *statuta* which he has confirmed, but the *statuentes* themselves have no such power of abrogation

* On Bartolus, and his doctrine of the *civitas sibi princeps* (the Italian city-state as 'its own prince'), see C N S Woolf's book on *Bartolus of Sassoferrato*, pp 112 sqq

if the confirmation he gave was *essentialis*, or if, even though it was only *accidentalis*, 'the Prince by confirming [a statute] made it his own law'—which is to be presumed the case

Suarez on the validity of custom

18 Cf VII, cc 1–20 According to c 3, nos 8–9, c 9, nos 3–11 and c. 14, no 4, a 'private person' or an 'imperfect community' (*una familia*) can pass neither a *lex expressa* nor even a *lex tacita* they can only establish a *praeceptum*, or a *statutum, per modum pacti seu mutuae conventionis*—and the 'precept' or 'statute' must be clearly expressed. On the other hand, any 'perfect community' (*civitas, populus, congregatio ecclesiastica, [corpus] mercatorum*) may *consuetudinem introducere*, inasmuch as, passively regarded, it is *legis capax*, and, regarded actively, it can make laws *ut conjuncta principi vel facultatem ab eo habens*, although its inherent power extends only to the making of *statuta conventionalia* None the less (according to cc. 13, 14, no 5 and c. 18), the consent of the Prince is always necessary [to the validity of customary rules], whenever 'the people itself is not the supreme Prince'. In the case of communities with a power of making rules, this consent can be given by a general authorisation in the case of other communities, the *de facto* toleration of a 'prescriptive custom' is adequate, but otherwise an act of personal assent is necessary—though that assent may be given tacitly, assuming always that the Prince is cognisant of the usage in question

Suarez on taxation

19 Cf V, c 14 only the sovereign can *tributa imponere* it is consequent on the nature of 'majesty' that any other person—though he may acquire a right to the exaction of traditional dues—can never acquire a right of taxation, and similarly, while the sovereign may grant to an inferior *ut nomine et auctoritate sua tributum imponat in particulari casu*, he cannot make a valid grant to an inferior of 'the general privilege of imposing a tax independently of his own approbation', since such a privilege would offend against the nature of the State and the *suprema potestas*

Suarez on religious congregations

20 Thus the answers given by Suarez (IV, c 6) to the question, *Quae communitates seu congregationes ecclesiasticae habeant potestatem leges condendi*, depend entirely on the fundamental principle that any autonomy belonging to ecclesiastical associations must either be the result of an 'ecclesiastical jurisdiction' granted by the Pope, or, if it takes the form of passing by-laws, then such by-laws can only be *regulae operandi positae ex conventione illorum qui sunt de communitate* see especially nos 12–13, 19 and 21

The corporate body reduced to a mere partnership, like the Family

21. Thus in Gregorius (XIII, c 2), Velstenius (*Decis* IV) and Liebenthal (*Disp* V), *collegia, corpora* and *universitates* are reckoned as *societates* in Heider (pp 268–71) they are contrasted, as *societates privatae*, with the *societas publica* of the State. Bodin (I, c. 2) compares families and corporations, without suggesting that there is any difference between the idea of family authority and that of the authority of the corporation in his view families are already competent to make *statuta* (e g 'house-laws' [like that of the Habsburg family], or compacts of mutual inheritance), and he only refuses to allow the making of such *statuta* to *familiae obscurae* (no 13) It has already been mentioned (supra, n 10) that Bornitius assigns the rights of corporations proper [*collegia in statu privato*] to the sphere of private law Arnisaeus (*Polit.* III, c. 12) also reduces the internal rights of associations to the level of the rights of 'societies' [or partnerships] · supra, n. 11, *ad finem*

22 Busius (I, c 13) their rights *continentur prope jure societatis*, but with some modifications, e g. they are not dissolved by the death of their members, and they can act on the majority-principle, see n. 12 supra.

28. The traditional [Roman-law] theory of corporations is reproduced almost in its entirety in Gregorius (cf also XIII, c 2, § 7 on *hospitalia* and *pia loca* regarded as *collegia*), in Besold [see vol IV of the *Genossenschaftsrecht*, not here translated, pp 11–16], and in other writers Some of the essential parts of that theory are also reproduced in Bodin, in Molina (cf e g II, d 3 on the property of corporations, d 300 on loans to an *ecclesia* or *civitas*, and d. 536 on *hypotheca tacita* of the property of the administrators of a corporation), in Suarez, and elsewhere *Continued use of the Roman law of corporations*

24. This is the view adopted by Bodin (III, c 7, nos 334–6), when he draws a line of division between (1) affairs in which *omnes singuli* must agree, because there is a question of a right belonging to all the members *seorsum a communione*, and (2) affairs in which the majority decides, because *jus universorum* is concerned Cf Oldendorp, op. cit 1, p. 163, and Liebenthal, *Disp* V, §§63–77 It is on the basis of this view that Bodin argues (loc. cit no 331) that it is compatible with the idea of a 'college' that there should be a *princeps collegii* who has *imperium in collegas* [i e over each distributively], but not that there should be a *princeps* with *imperium in universos* [i e over all collectively], as there is in a *consistorium*, a *gymnasium*, or a *familia* Arnisaeus takes a similar line, op cit p 133 *Bodin's distinction between 'distributive' and 'collective'*

25 Thus Bodin (loc cit no 332), in spite of his description of *jus collegii* as *jus universorum*, argues in favour of the continuance of this *jus collegii* until it is legally abolished, even when all the members [*collegae universi*] have disappeared—declaring that it is folly to identify the *collegium* with the *collegae* [He thus assumes that a college is a fictitious individual, distinct from its individual members.] He also regards the capacity of owning property, and particularly that of inheriting it, as a special privilege granted to the *collegium* [as a fictitious individual] *But he also assumes a* ficta persona

26 Bodin (loc cit nos 334–6) deals in detail with the validity of the majority-principle, recognising that principle in so far as there is nothing to oppose it either in *jura singulorum* or in *leges ejus qui collegii creator est quasque princeps imperio suo valere jussit* But majority-decisions, he argues, require a regular meeting, and the presence of two-thirds of the members, and then *plus possunt duae partes coactae quam omnes seorsum.* They bind the minority, and all individuals, but they do not bind the whole body itself or the majority The majority can always abrogate its decisions, as the sovereign can abrogate a law, or the testator a will, or contractors a contract, and this is the case even with a unanimous decision, if the question concerned is one *de jure universorum*, though not if it be one *de jure singulorum seorsum* Bodin mentions, in this connection, that he had himself prevented a decision of two of the *Ordines Francorum* which would have enured to the detriment of the Third Estate *Bodin on the majority-principle*

27 Cf Busius, supra, n. 12; Arnisaeus, *De maj* III, c 7, § 10 ('*in conventionis*')

28 Cf Bodin, loc. cit nos 337–42 (supra, n 8), and Oldendorp, loc. cit. p 39

29 Thus Molina (II, *disp.* 3, §§7, 11, 12) draws a distinction between (1) *dominium universitatis*, which belongs to it *jure universitatis* and includes pastures and forests which are used by all and (2) *dominium particulare... quod .. universitas seu communitas aliqua non secus habet ac si esset persona privata* He holds that the taking of wood in the common forest (*disp.* 58), and the use of the common pasture (*disp.* 59), are dependent on the regulations made by the *The Catholic writers on village commons*

local community as owner, but he argues that offences by members of a local community against such regulations—unlike encroachments on the pastures or forests of other communities—should be punished only by fines, and not by the exaction of compensation (unless it be a question of really considerable damage), because the common property still remains intact [after the offence has been committed]. He refuses to admit that the lord of the manor court has any property in the common, and allows him only a joint right of user *suo ordine et gradu* (d 3, §11, d 59, §§3–5)

Similarly Lessius (II, c 5, dub 13–14) denies any obligation to pay compensation (unless 'great damage be held to have been done to the community') in cases where a community has prohibited the use of its pastures and public woods and a person has offended against such a prohibition *in loco publico communitatis cujus ipse est pars*

Lugo (I, pp 142sqq , disp 6, sect 9) takes the same view [that no compensation is due], unless there is a question of considerable damage, or of use for profit by means of sale to others, or unless the common has been let to a third party He argues that any offence [by a member of the community against its regulations], unlike encroachments on entirely strange woods and pastures, which belong to another community or to a private person, is only an offence against *oboedientia*, and not an offence against *justitia* The relation between *universitas* and *singuli* is different, however, in a monastery [from what it is in the case of a secular body] [In the latter case], *oppidani singuli retinent suum jus partiale ad illa bona*, and they have a right of controlling their shares, because full and free property remains with the community and its members, even if the administration thereof has been transferred to some manager on its behalf [In a monastery], although the monks *in communi habeant eorum bonorum dominium, ita tamen tota administratio est penes communitatem vel praelatos, ut singuli neque ex parte possint condonare aliquid*

Suarez on the various forms of community

80 Suarez distinguishes between (1) the 'natural community of mankind' and (2) the *communitas politica vel mystica*, which is 'only one in virtue of a specific act of union in a moral association' The latter kind of community is either of divine foundation (the Church) or of human invention The community which is of human invention is again either (1) 'a perfect community, which is capable of political government', or (2) 'an imperfect community', which does not form a *corpus* and is destitute of *vis coactiva* 'Perfect communities' include not only the State but also local communities, and not only 'real' but also 'personal' groups (such as orders and fraternities)—provided that such local communities and 'personal' groups have *perfectum regimen et moralem unionem*, and so, while 'imperfect as parts in regard to the whole', are 'perfect as regarded in themselves' Even so, they are 'not absolutely, but comparatively or relatively, perfect' On the other hand the 'private household' under the paterfamilias is absolutely imperfect cf I, c 6, nos 18–20, and also supra, nn 16 and 18

81 According to I, c 6, only a 'perfect community' is *passive legis capax* (nos 1–16 and 21–22) But law need not always be imposed on the community *qua* community (*ut communitas est et corpus mysticum*) On the contrary, it generally affects the community not as being a community, but as being so many individuals (*non collective, sed distributive*, no 17), and it may also refer to a part of the community only (nos 23–4) Yet a law which only affects the community *qua* community—e g a law which commands or forbids some act which can only be done by the *corpus mysticum* itself—is still

a true law, for though such a law applies to *una individua communitas* and this community is called *una persona ficta* [i e. though the law seems to be made for *one* 'person', which is contrary to the nature of law], yet the 'community' is a 'community' [i e a sum of persons], it possesses the necessary permanence, and it is directly intended to secure the common welfare of *all* its members Moreover, the *singuli de illa communitate* are also indirectly obliged by such a law See, in addition, I, c 7, and (on the other hand) the passages on the contractual character of 'statutes' cited in nn 17, 18 and 20 above

32 Cf the *Vind c Tyr*, where it is argued that any part of the kingdom, and therefore any province or city—but not any individual, because the individual is not a 'part'—has the right and duty of resistance when the pact with God is broken (qu II, pp 94sqq) These parts too have severally promised for themselves [just as the whole kingdom has promised for itself] that they will be true and obedient to God in accordance with the stipulation He has made (pp. 99–100)—as is also the case, the author adds, with the Estates of the Empire in Germany, or with 'parts' of the Church, such as the *ecclesia Gallicana* [as a part of the Church Universal] Therefore, *universi in regionibus et urbibus* may rise in revolt, *auctoribus magistratibus tanquam a Deo primum, dein a Principe constitutis* (p 114), and cities and provinces which do not seek to avert an attack on God's church by force of arms are guilty of a grave sin (p 228) [As *universi* in a province or city may resist, so, too, may the governors] *qui alicujus partis regionisve tutelam susceperunt, tyrannidem tyrannumque ab ea regione urbeve arcere jure suo possunt* (qu III, pp 304 sqq and 326 sqq), and thus individual nobles [as having the *tutela* of a 'part'] may begin a revolt, though private persons can never assert the *jus gladii* against a tyrant The treatise *De jure mag* (qu 6, pp 26 sqq and 74, qu 7, p 92) arrives at similar results Danaeus (III, c 6, p 223) requires the consent of every province to any change of the constitution, and he adds that, when a province is not asked for its consent, 'some hold that it can choose for itself its own form of polity'—but this, he adds, is dangerous

The Vindiciae on the rights of provinces and cities

33 Cf for what follows, the first eight chapters of Althusius' *Politica*, and also c 9, §§1–7, c 18, §§90–1, c 38, §§76 and 110–14, c 39, §84 see also the connected account of the argument of these passages in the author's work on Althusius, pp 21sqq Reference may also be made to his *Dicaeologia*, I, cc 7–8, 25–33, 78–81

34 Cf vol III of the author's *Genossenschaftsrecht*, pp 544–5

35 Althusius mentions (*Polit* c 4, §25)—but without ascribing any great significance to it—the special category of the *corpus* (which is a broader association of a number of *collegia*), as assumed in Bodin and other writers Like Bodin and others, he counts as 'colleges' not only (1) guilds and trade-corporations and (2) corporate Estates and ecclesiastical societies, but also (3) collegiate courts of justice, administrative Boards and ecclesiastical Boards (c 4, §30), and (4) assemblies of representatives (c. 5, §§54 and 60sqq), provincial diets (c 8, §§49 and 56sqq), and general diets (c 18, §62 and c 33)

Althusius' classification of collegia *or 'Fellowships'*

36 In the first edition of the *Politica*, the category of 'political association' is lacking. In that edition Althusius begins his classification of associations by distinguishing the *consociatio particularis* from the *consociatio universalis* (i e the State); he then subdivides the *consociatio particularis* into the *consociatio naturalis necessaria* (i.e. the Family) and the *consociatio civilis spontanea*, and

finally he subdivides the 'voluntary civil association' into the *consociatio privata in collegio* and the *consociatio publica in universitate*

37. On the political theory of Althusius see, in the previous section, nn 36, 52, 57, 65, 67, 70–3, 75, 77, 82–5, 87, 96, 106, 108–9

38. See supra [vol IV of the *Genossenschaftsrecht*, not here translated], pp 178 sqq.

The idea of of the Respublica Composita

39 This is the line followed by Casmannus (c 66), who contrasts this *composita respublica* with *civitates confoederatae* It is most marked in Hoenonius, who places the kingdom composed of a number of cities—under the name of *respublica composita* (d 12)—half-way between the city-state, which he terms a *respublica simplex* (d 11), and the 'confederation' proper He vests the several parts of this 'composite State' with a large measure of autonomy, including even the right of secession (d 9, §§44–54), but he regards *collegia et sodalitates* as merely useful divisions of the subjects of the State (d 2, §§52–7)

German legal writers who largely follow the federal scheme of Althusius

40 See, for example, Matthias (*Coll polit* d IV–V and *Syst polit* pp 20–194) *Societas*, which is the primary conception, is either 'natural' or 'civil and voluntary', 'natural society' includes the three 'domestic societies' [husband and wife, father and child, master and servant] 'civil and voluntary society' shows itself first in its 'particular' form—in the *vicus*, *pagus*, *oppidum*, *collegium*, *corpus*, *universitas* and *civitas*—and then in its 'universal' form, the *respublica*

Gneinzius treats successively of the Family (ex II–VII), the provincial community (ex VIII), *collegia* (ex IX), and the *civitas* (ex X) he declares 'Fellowships' to be useful (ex IX, qu 2), but regards them as permissible only *ex auctoritate superioris* (ibid qu 5)

Koenig begins his theory of the State by enumerating Families, *collegia*, *corpora* and *universitates* among the constituent elements of the *Respublica*, and he then sketches the process of development towards increasingly broader and higher forms of society (*Acies disp* 1, §§123–9, *Theatrum polit* 1, c 1, §§376–91)

Werdenhagen starts his classification of *societas humana* (II, c 13) from the distinction between 'particular' and 'universal' society 'Particular' society he divides into the 'simple' society of the family community (cc 14–17), and 'composite society', which may be either an extended family-group (c 18) or a 'Fellowship' (c 19) Under the head of 'universal society', which is also termed *universitas*, he counts the *vicus*, *pagus* and *civitas*, but he thinks it a misuse of language that institutions of higher education should be designated by this term (c 20) He expressly insists that the 'principal cause' of every *collegium* is the agreement of its members, the 'grant of a superior' being the 'less principal' (though still an indispensable) cause (c 19, §5)

Berckringer (1, c 17), in dealing with 'the conjunction of persons and things in the family, college, *corpus* and *universitas*', begins with the Family (§2), he then deals successively with the 'college', which is produced by the *consensus coëuntium et magistratus* (§§3–8), the *corpus* (§9), and the *universitas* (§§10–11)—including both the *universitas personarum* (§§12–17) and the *universitas rerum* (i e the territory, §§18–21)), finally, he treats of the union of both of these species of *universitas* in the *Respublica*, which, he holds, may be either 'simple' or 'compound' (§§22–8)

Kirchner, in treating of *sodalitia*, *collegia* and *corpora* (*disp.* XIV), regards

all corporate bodies as having autonomy and judicial authority over their own members, with a certain power of coercion and punishment In §1, litt d, he speaks of a 'concession by the supreme power' as necessary, but in litt e he states that corporations are advantageous to the State, and only a tyrant will ever suppress them entirely—though secret and nocturnal meetings are never to be tolerated (§3)

Keckermann on associations

41 Cf especially Keckermann (1, c 15, pp 255–75), *de speciali cura subditorum collectim consideratorum* He distinguishes *subditorum communio ex natura* (i e the Family) from *subditorum communio magis ex instituto civili*, though he admits that community of the latter sort is also based partly on natural law Community by civil institution may be either (1) 'more particular', e g *collegium, coetus, conventus, synagoge* and *sodalitas*, or (2) 'more universal', as in any sort of *collectio plurium diversi status hominum in unum corpus et locum in quo simul habitant* The latter species—the territorial corporation or *universitas*—may be either 'major' or 'minor' The 'minor' sort is the local community, which appears as a *universitas rustica in vicis vel pagis*, and as a *universitas oppidana vel urbana* in the various sorts of towns The 'major' sort of territorial corporation is an area composed of a number of rural and urban communities, and such an area may be either *angustior* (e g the 'district, prefecture, barony, county') or *latior* (e g the 'province, duchy, kingdom')

In spite of the structure which he thus builds, Keckermann rejects the principle of liberty of associations, as being incompatible with the monarchical principle Where 'colleges have liberty of meeting', as the nobles have in Poland, it is a sure sign of the presence of aristocracy or democracy The monarch cannot allow any association which has not received his consent, and he must punish secret unions severely, nor will he ever permit his subjects to erect a corporation *cui ipse non praesit sua auctoritate per personam aliquam a se delegatam* He will also reserve the appointment, or at any rate the confirmation, of the officers of 'colleges', since the 'constitution and authority of the whole college' resides in these officers, and therefore the person appointing or confirming them 'has also control over the constitution and authority of the whole college' Even in republics, he argues, this [right of appointing or confirming the officers of 'colleges'] is advisable (pp 261–2) He treats the local community in the same way as the 'college', vesting the sovereign with the ordering of its constitution, the appointment of its officers, and a perpetual tutelary supervision (pp 265 sqq)

Schonborner adopts a similar view He treats of the Family (1, c 10), *collegia et corpora* (c 11), *universitates* (c 12) and the *civitas* (c 13), but like Keckermann he allows the erection of corporations only 'by the authority of the sovereign', and he gives the same advice to the sovereign, word for word, in regard to [the appointment or confirmation of] officers The same line is taken in the treatise *De statu politico seu civili libri sex*, 1, disc 35–42

Prevalence of idea of Partnership

42 Keckermann (loc cit) adopts as his basis the conception of *communio* Matthias (loc cit) uses the idea of the *communicatio* produced by *societas* Schonborner adopts Althusius' theory of *consociatio* and the *communicatio rerum, operarum, juris et benevolentiae* which it produces (1, c 11), but he regards this *consociatio* and *communicatio* as creating a *corpus mysticum* which is like the natural body—*instar unius hominis est, ejusque personam repraesentat*—and he avails himself of this point of view to reproduce *in extenso* the whole of the Roman-law theory of corporations (1, c 13)

Berckringer takes the same line as Schonborner He uses the idea of a

'union of minds, services, persons, things and laws' (I, c 17, §7), the fiction of the single personality, combined with the idea of the material identity of the *universitas* with its individual members (§10), the traditional theory of the *negotia juridica* and the delicts of corporations (§§12–17), and the customary distinction of the various species of public and common property (c 16, §§15–33)

Grotius on associations

43 Afterwards, in his theory of contracts (II, c 12), he treats of *societas negotiatoria* (§24) and *societas navalis* (§25), and devotes a whole chapter to *foedera* (c 15)

44. Cf I, c 1, §3 a 'society without inequality' exists as between *fratres, cives, amici, foederati* an 'unequal society' as between *pater et liberi, dominus et servi, rex et subditi, Deus et homines* In the same way there are also two sorts of *justum—aequatorium* and *rectorium*

45 II, c 6, §§4–8, III, c 20, §5 cf the passages in nn 97 and 132 to §14

46. Cf supra, nn 57 and 66 to §14

47 Cf supra, n 51 to §14 and pp 51–2sqq , with nn 97, 98, 99

Grotius on the majority-principle

48 Cf the decisive statement in II, c 5, §17, quoted in n 74 to §14 Grotius proceeds to discuss in detail a number of questions—the possibility of an equality of votes, in which case no decision can be attained [in matters of policy], but in criminal proceedings acquittal must follow (§19), the methods prescribed by Natural Law for arriving at a decision when there are more than two *sententiae* (§19), the rule of Natural Law by which *jus absentium accrescit interim praesentibus*, while positive law often requires the presence of two-thirds (§20), the 'natural order' among the *socii*, according to the ages of the members (§21), and the counting of a majority by the shares [belonging to the members] where a *res* (e g an inheritance or an estate) is the basis of the *societas* (§22)

Grotius on corporate liability for debt

49 III, c 2, §1 It is true that the members are responsible for the sum involved in proportion to their shares, but they are responsible *non qua singuli, sed qua pars universorum* As against this rule of Natural Law, the *jus gentium voluntarium* may introduce, and appears to have actually introduced, the rule that *pro eo, quod debet praestare civilis aliqua societas aut ejus caput*, 'there is a lien and obligation' (sometimes primary and sometimes secondary) 'on *all* the goods, corporeal and incorporeal, of the persons who are included in such a society or are subject to its head' (ibid §2) There is a need for such a rule, since it is difficult to get at the *imperantes*, nor does it contradict Natural Law to such an extent as to be inadmissible

Grotius on the delicts of corporate bodies

50 Cf II, c 21, §§2–7. A community is responsible, properly speaking, only for its own delicts, and thus it cannot be responsible for a *factum singulorum*, except as the result of its own *patientia* or *receptus* (i e harbouring the person or persons concerned) Conversely, *singuli* are responsible for the offences of the *universitas*, and *subditi* for the delicts of the *summa potestas*, only in cases where they have incurred a joint responsibility by giving assent thereto or by executing an unlawful command The results [of a corporate delict] descend, it is true, from *universi* to *singuli*, because *ubi universi, ibi et singuli universi non possunt nisi ex singulis quibusque constare, nam singuli quique congregati, vel in summam reputati, faciunt universos* But the innocent minority must be treated gently in the matter of punishment, because, in spite of what has just been said, *distinctae sunt poenae singulorum et universitatis* There is a distinction, for instance, between the death-penalty, as applied to individuals, and *mors civitatis, cum corpus civile dissolvitur* similarly the enslave-

ment of individuals differs from the *servitus civilis* of the *universitas* or its transformation into a mere province Similarly, again, the confiscation of corporate property is something different from the confiscation of private property It is thus unjust that innocent individuals should lose their property through the delict of a *universitas* (cf also §§ 11, 17, 18) On the other hand, a 'consequential loss' *may* affect innocent individuals, just as children suffer from a confiscation of property pronounced against their parent, so individuals suffer from the punishments inflicted on corporations—*sed ea in re, quae ad ipsos non pertinet nisi per universitatem*

51 See the preceding note, and also nn 67, 70, 89, 90, 121 and 127 to § 14

Grotius tends to resolve corporations into individuals

52. In treating of the question raised in II, c 21, §8—whether 'a penalty can be exacted in *every* case for the delict of a *universitas*'—Grotius argues that an affirmative answer appears to be inevitable, because *quamdiu universitas durat, idem corpus est* The true answer, however, is in the negative A distinction has to be drawn between attributes which are predicated *de universitate primo ac per se*, e g the possession of an *aerarium* or of *leges*, and those which only belong to it *de derivatione a singulis*, e g the attributes of learning, courage, or merit, for such attributes primarily appertain to individuals, *ut animum habentibus, quem universitas per se non habet* In the latter case, therefore, the merit disappears *extinctis illis per quos ad universitatem meritum deducebatur*, and what is true of merit is also true of [the opposite of merit, i e] a delict which involves a penalty The position is different, however, in regard to divine punishment, which often comes upon a later generation only

53 Hobbes' theory of associations, which is only indicated in the treatise *De cive*, is developed in the *Leviathan*, where the whole of c 22 is devoted to it

Hobbes on corporations

54 Cf *Leviathan*, c 22 and *De cive*, cc 12–13 Hobbes compares *corpora legitima* to the muscles of the human body, and *illegitima* to its worms [Hobbes remarks that in any event 'the great number of corporations' is 'like worms in the entrails of a natural man']

Hobbes on Parliament

55 Hobbes, in c 22 of the *Leviathan*, also applies this idea to parliaments, which he regards as 'regular subordinate systems', with a personality of their own, which have been instituted for a limited time They can only discuss proposals put before them by the Ruler, and they have no authority other than given by the terms of their summons, otherwise there would be two powers in the State

56. This is the argument of the *Leviathan*, c 22, but it already appears in the *De cive*, c 5, § 10 In such a case [i e the case of a claim by a subordinate system against its members] the members may also occasionally protest with success against majority-decisions, but this is inadmissible in a sovereign assembly, where such a protest would bring in question the *suprema potestas* itself, and where, apart from that, *quicquid fit a summa potestate auctoribus fit civibus singulis et omnibus*

Hobbes on colonies and companies

57 In provinces and colonies he thinks a monarchical constitution preferable, as even democracies generally recognise Trading companies, on the other hand, are best managed by a *coetus*, with a right of voting for all who contribute money *Leviathan*, c 22

Hobbes on sins and delicts of groups

58. He states a different point of view in the *De cive*, c 7, § 14. Dealing with the question whether the 'person' of the State can itself commit sin, he concludes that in a monarchy the Ruler himself commits a sin if he offends against Natural Law, *quia in ipso voluntas civilis eadem est cum naturali*, whereas

in a democracy or aristocracy the sin is not that of the *persona civilis*, but of *cives illi quorum suffragiis decretum est—peccatum enim sequitur voluntatem naturalem et expressam, non politicam, quae est artificiosa*

No question of a *delictum* [i e a legal offence, as distinct from sin or *peccatum*] can ever arise in this connection [i e in regard to the State], as it does in regard to *Systemata subordinata* The point is simply that *peccatum*, i e sin as distinct from delict, cannot be attributed to a *persona civilis* [as such, and apart from the 'natural will' of its bearer]

Hobbes on the debts of groups

59. Hobbes would regulate responsibility for debts in *Systemata mercatorum* in a somewhat different way In such 'systems' there should be an obligation 'of each member severally to pay the whole of the debt' to a third party, because that party knows nothing of an 'artificial person', *sed personas naturales eorum omnes obligari sibi supponit* On the other hand a creditor who is also a 'member of the System'—being, in that capacity, a debtor himself [and so unable to take action against individuals which would also be action against himself]—can only take action against the system and its common funds [In this latter case, therefore, the general rule enunciated in the text, that the system alone is liable, applies also to *systemata mercatorum*] If the State, by virtue of its supreme power, demands money from such a system, the members must furnish the sum demanded by making proportionate contributions [i e contributions proportionate to their shares]

The Empire a mere name

60 Cf e g Biermann's *Diss de jure principatus*, i, p 6, § 10, Michael, i, p. 188, §§9sqq , Cluten, ii, p 10, §3 and pp 35sqq , §§9–15, Engelbrecht, ii, p 187, §§97sqq , Sinolt Schutz, i, ex 1, th 16–19 A different view appears in Wurmser, *Exerc* iii, qu 2 and 22 (the Empire is now only a name) cf also Limnaeus, vii, c 1, no 32 (Roman Empire and German monarchy have gradually merged to such an extent *quod nemo, nisi ille qui divum choros regit, dissolvere potens est*)

Suarez (iii, c 7, nos 1–13 and c 8) expressly denies the emperor's *imperium mundi* even the Pope, according to iii, c 6, has no such *imperium*, because, apart from the States of the Church, he has no 'direct temporal power' Cf also Vasquez, cc 8, 20, 21

The idea of a societas gentium

61 Connanus (i, c 5, nos 1 and 4, and c 6, nos 2–3) holds that *jus gentium* is the product of a *societas humana*, in which the original unity of mankind has continued to be preserved even after its division into 'civil societies', and in which a relic of the old community of all men thus persists For similar expressions cf Omphalus, i, c 38 and Winkler, i, c 9

Gregorius Thol (i, c 3, §§11sqq) regards *commune jus gentium* as the survival of a *civitas mundana*, with God for its king and all men for its citizens, which in all other respects has split into *coetus et civitates particulares*

Gryphiander, in §§12sqq of his *De civili societate* (printed in Arumaeus, i, no 6), speaks of a *universalis societas humana, cujus vinculum est jus naturale* Cf Johannes a Felde, i, c 1, §5

Suarez (iii, c 2, no 5, c 4, no 7, c 19, no 9) argues that in secular matters *aliqua unitas* still survives from the [original] unity of mankind, so that men continue to constitute a *societas et communicatio*, and although *unaquaeque civitas perfecta, respublica, aut regnum, sit in se communitas perfecta et suis membris constans, nihilominus quaelibet illarum est etiam membrum aliquo modo hujus universi* this is the basis of international law

Grotius speaks of [States as] *membra unius corporis* (ii, c 8, §26, c 15, §§5 and 12), of a *societas humana* (ibid c 20, cf c 21, §3), and of *jus gentium*

as securing property even to children and lunatics, *personam illorum interim quasi sustinente genere humano* (ibid c 3, §6)

62. Albericus Gentilis (in his *De jure belli* of 1588, pp 11–13) refers the obligation of *jus gentium* to the fact that, although all peoples have never assembled [to enact it], *quod successive omnibus placere visum est, id totius orbis decretum fuisse existimatur* He adds *immo, ut recto civitatis et legislatio est penes civitatis majorem partem, ita orbis recto est penes congregationem majoris partis orbis.* *Ideas of a world Commonwealth*

In the same way Victoria speaks of a human commonwealth, including all States as its members, in which majority-decisions are valid (*Rel* III, nos 12 and 15)

The *Vind c Tyr* makes the unity of *humana societas* the source of a right and duty of neighbouring States to intervene for the protection of oppressed subjects against a tyrant (qu IV, pp 348–58)—just as (ibid pp 329–48) it makes the conception of a single Church the justification of intervention against religious oppression

Boxhorn (I, c 2, §§3–8) regards *jus gentium* as the outcome of the *universalis Respublica omnium hominum*

63 The idea [of a natural community connecting States] is absent in Bodin and his school In the view of Hobbes, as we should expect, the natural condition of States, like the primitive state of nature among individuals, is a condition of *bellum omnium contra omnes*, and a real international law is therefore absolutely impossible *No internationalism in Hobbes*

64 Suarez (loc cit) lays emphasis on the idea that it is only particular nations which are States with legislative power There cannot, therefore, be any *leges civiles universales*, common adhesion to international law constitutes only a *societas quasi politica et moralis*, and it is only 'in a sense' (*aliquo modo*) that States are members of a larger whole Connanus also (loc cit) terms the universal society only *quasi omnium urbs et civitas*, and international law only *quasi jus civile* *Suarez on international society*

65 Cf Bodin (II, c 6, no 224 and c 7), Althusius (*Polit* c 17, §§25–53), Casmannus (c 66), Hoenonius (dd 12 and 13), Grotius (*Apologeticus*, Paris, 1622, c 1). See also Brie, *Der Bundesstaat*, I, pp 14sqq and G J Ebers' recent work on *Die Lehre vom Staatenbunde*, Breslau, 1910, pp 10sqq *Federal ideas*

66 See above [vol IV of the *Genossenschaftsrecht*, not here translated], p 274 no 74 See also Werdenhagen (III, c 25, §16), on a federation as a *corpus foederatorum*, but not a *respublica*, Althusius (c 33, §§122–36), on *comitia sociorum confoederatorum*, and Arnisaeus (*De rep* II, c 4, s 2, §§22sqq), on *confoederationes arctiores* which have the appearance of a *Respublica*

67 In I, c 3, §7 Grotius deals both with 'unions' (which he knows only in the form of personal unions), and with 'confederations' (*Staatenbunde*) In II, cc 15–16, on the other hand, he deals only with *foedera* or treaties, which he divides into 'equal' and 'unequal', and he remarks in an earlier passage (I, c 3, §21) that even an 'unequal treaty' does not extinguish sovereignty. Grotius was the first thinker to draw the contrast between unions and federations cf Juraschek, *Personal and Real Union*, p 2, and Ebers, op cit pp 17sqq *Grotius on unions and foedera*

68 See Victoria, *Rel* I, qu 5, no 8 and III, Vasquez, *Controv* 8, 20, 21, 27, Soto, IV, qu 4, a 1–2, X, qu 3, a 1, Molina, II, d 21, Lessius, II, c 5 and III–IV, Suarez, I, c 7, no 5, c 8, no 9, III, c 3, no 8, cc 6–8, Contzen, II, c 16 and VI, Claudius de Carnin, I, cc 13 and 15, Menochius, *Hiero-* *Catholic theory of the Church as superior*

politica, I, c. 1 and II, cc. 1 sqq. Among the Monarchomachi, see Boucher, I, cc 5–8 and 18, and II, Rossaeus, cc. 3–11, Mariana, I, cc 8 and 10.

See also Pighius (†1542), *Hierarchiae ecclesiasticae assertio*, Cologne, 1551 (first printed 1538), Sanderus, *De visibili monarchia Ecclesiae, libri VIII*, Louvain, 1571, Schulting, *Hierarchiae anacrisis*, Cologne, 1604

Theory of its potestas indirecta

69 See Bellarmine, *De membris ecclesiae militantis*, III, 6, *De Summo Pontifice lib V*, and *De potestate summi Pontificis in rebus temporalibus adv Barclaium*, Rome, 1610, Molina, II, d 29, Suarez, III, c 6, Barbosa on c 6, X, I, 33 [of the canon law], Gonzalez Teller on c 6, X, I, 6, no 34 and c 6, X, I, 33, nos 14–19 A similar view is already to be found in Soto, IV, qu I, a I Of course the theory which ascribed to the Pope a direct power over emperor and kings did not disappear: cf e g Restaurus Caldus in *Tract Utriusque Juris*, XVI, no. 30, qu 50, Marta, *Tract de jurisdictione*, Mainz, 1609 (esp I, cc 5, 8, 17–26 and IV); Laymann on c 34, X, I, 6 and c 6, X, I, 33

Theory of its parity with the State

70 Cf Gregorius Thol VII, c 2, Tulden, *De regimine civili*, I, cc 17–18, P de Marca, *De concordia sacerdotii et imperii seu de libertatibus ecclesiae Gallicanae libri VIII*, ed. J H Boehmer, Leipzig and Frankfort, 1708 (books I–IV first printed at Paris in 1641, and the whole work in Baluze's edition of 1603), esp. II, c I, where it is argued that while there are *potestates distinctae*, there is a *societas* between the two * See also supra [vol III of the *Genossenschaftsrecht*], pp. 813 sqq

71 See supra, vol III, pp 799 sqq

The Lutheran theory

72 A complete formulation of this expression is to be found in B Carpzov, *Jurisprudentia ecclesiastica seu consistorialis* In I, tit I, def 2, he describes the 'double person' of the territorial prince, who exercises 'double power, ecclesiastical as well as political' in I, tit I, deff 11–12, he treats of the consistories as his organs in I, tit 3, def 27, he explains the ordered co-operation of the 'whole church' in the three Estates see also *Decis.* 113 But a full elaboration of the theory of the episcopal system may already be found in M Stephani, *De jurisdictione*, III, p I, cc I and 15 In addition see Omphalus, I, c 3 (there is a 'double polity', but the ecclesiastical commission of the territorial prince comes from God), E Cothmann on *Cod* I, 2, qu. IV and *Cod* I, 2, Arnisaeus, *De jure maj* II, c 6, *De subjectione et exemptione clericorum*, etc (published at Strassburg in 1635, but written in 1612), B Meiszner, *De legibus*, IV, s 2, Wurmser, *Exerc* V, qu 1–24, Cluten, in Biermann, II, pp 18 sqq, §§5–8, Lampadius, p I, §§16–29, Schutz, II, exerc. 14, pp 911–1000, Knipschildt, II, c. 3 and V, c 8

Zepper and others on the Calvinist polity

73. This view is worked out completely in e g Zepper, *De politia Ecclesiastica*, Herborn, 1595 He treats in Book I of the subject-matter of ecclesiastical administration, in Book II of ecclesiastical office, in Book III of church government Church government is conducted by *conventus* in the four stages (cc 1–7) of 'presbyteries', *conventus classici* [or 'classes'], provincial synods and general synods (subject to the general principle that *quae in inferioribus conventibus aut gradibus decidi possunt, ad superiores devolvi non debent*), and also by *visitationes* (cc 8–11) But the secular authority has a power of co-operation, since *magistratus* and *ministerium* are two institutions of one and the same community, ordained for the Church by God (c 12) Compare also the doctrine of the *Vind c. Tyr.* (qu. II, pp. 74 sqq) on the joint contract

* Cf, for this theory of 'alliance', the work of Warburton, Bishop of Gloucester, on *The Alliance between Church and State*, published in 1736 It was a work which had some vogue in England during the eighteenth century.

of people and king with God, the treatise *De jure mag* (qu 10), Hotoman, *Francogallia* (c. 22), and especially Althusius (c 8, §§6–39, c 9, §§31 sqq and c. 28) Cf also David Blondel, *De jure plebis in regimine ecclesiastico*, Paris, 1648, on the inalienable rights of the congregation, which are never transferred to the government

None of this applies, of course, to the body of opinion which is based on the teaching of Zwingli. Zwingli rejected entirely the conception of a 'spiritual State' and a 'spiritual authority', and ascribed all power of ecclesiastical government, as being 'external' in its nature, to the Christian State see his *Works*, I, pp 197 and 346

74 Cf Stephen of Winchester, *Oratio de vera oboedientia* (1536), in Goldast [*Monarchia Sancti Romani Imperii*], I, pp 716–33, where it is contended that *Reges, Principes et Magistratus Christiani unusquisque suae Ecclesiae supremum in terris caput sunt, et religionem cum primis procurare debent* Cf also Johannes Beckinsav, *De supremo et absoluto Regis Imperio liber unus*, with a dedication to Henry VIII, in Goldast, I, pp. 733–55, Waremund de Erenbergk, *De regni subsidiis* (cc 1–2, pp 12–43), who argues for a *jus majestatis, supremitatis, superioritatis absolutae potestatis etiam in ecclesiasticis*), Alexander Irvine (Scotus), *De jure regni diascepsis*, Leyden, 1627, Keckermann, *Polit* I, c 32, who holds that *princeps habet jus majestatis ecclesiasticum, ideoque potestatem ordinandi ea quae ad cultum Dei et veram religionem tuendam pertinent*, p 516, Fridenreich, *Polit* c 12, Hoenonius, *Polit* I, §43, V, §§3–55, Kirchner, *Disp* VI, Graszwinkel, *De jure maj* c 5 *The territorial theory*

See also Carolus Molinaeus, *Comm. ad Codicem*, on *Constit Frid Imp* '*Cassa et irrita*', pp 29–30, and Besold, *Diss de maj* sect 2

75. See above (vol IV of the *Genossenschaftsrecht*, not here translated], p. 82, n 65, and cf Besold, *Diss de maj* sect 2, *Diss de jure coll* c 2, §§5–6, *Diss de jure et divisione rerum*, c 5

76 See, on the one side, Hobbes, *De cive*, c 17 and *Leviathan*, c 39, and on the other, Milton, *Prose Works*, II, pp 520sqq *Uniformity or toleration*

Biermann (*Diss de jure princ* I, no 16, §§21 sqq) also combines the demand for freedom of conscience (§§26–8) with a general point of view which is 'territorial'.

77. Fourth edition, the Hague, 1661 first printed at Paris, 1648

78 In this justification of the majority-principle (c 4, §6) Grotius, it is curious to notice, deserts the individualistic point of view on which he strictly insists, in this very connection, in all the rest of his writings (cf supra, n 48). *Grotius'* De Imperio

79 See c. 4, §§9–13 The *regimen constitutivum ex consensu*, which issues in e g the institution of the Sabbath and the appointment of deacons, belongs to the Church by Natural Law, *data enim universitate, hoc ipsum jus ex natura universitatis continuo sequitur* Positive law may deprive the Church of particular rights, but it may also confer upon it an *imperium summum* or *inferius*.

80 Positive law may confer upon pastors an *imperium inferius* But in that case such *imperium* is not the expression of the *sacra functio* they exercise—a function which is subject to the State only in the ordinary way It is the outcome, and the expression, of political authority, and therefore pastors, in so far as they exercise such an *imperium, supremarum potestatum vicarii et delegati sunt*. Cf c 2 and c 4, §§7–8, 11–12 and 14

81. Cf c 1 Grotius proceeds to deal in detail with the action of sovereignty upon the different areas of ecclesiastical life, maintaining throughout

Grotius on the rights of the Sovereign over the Church

the principle that the indestructible rights of the sovereign continue still to exist, by virtue of Natural Law, even where certain rights are delegated, by virtue of positive law, to other ecclesiastical or secular 'Subjects' It depends on the will of the sovereign whether he admits co-operation of the clergy (c 6) or the participation of synods (c 7, §§1–8) in the exercise of ecclesiastical authority, which includes the power of deciding on doctrine (c 5). He can appoint the members of synods, or he can allow them to be elected with a reservation in favour of his own *jus imperii in electionem*, he has the power of summoning, adjourning and proroguing synods, and he possesses the right of confirming, changing or altering all the acts of synods (c 7, §§9–17) Ecclesiastical legislation belongs to him, including the allowance and disallowance of confessions, and the ordering of all things which concern 'the public exercise of true religion', the Church has no right of legislation at all in virtue of the law of God, and so far as it possesses such a right in virtue of positive law, it possesses it, at the most, only *cumulative et dependenter* (c 8) The sovereign alone has *ecclesiastica jurisdictio*, all *jurisdictio* of the clergy, so far as it is not really simple *suasio et directio*, is based on delegation by the State, and is subject to *appellatio ab abusu* (c 9) The sovereign has the confirming and dismissing of the holders of the necessary ecclesiastical offices (*presbyterium* and *diaconatus*), and while the original appointment of such persons belongs *naturaliter* (though at the same time *mutabiliter*) to the Church, the sovereign not only controls all appointments, but may also make them himself (c. 10) He can also institute ecclesiastical offices which are not 'necessary' (the offices of bishop and elder, c 11) he retains supreme authority over all boards or corporations or persons in possession of ecclesiastical powers, since any *inferior potestas* exercising a *jus circa sacra* necessarily derives such right from him, moreover, the authority exercised by such inferior powers must be circumscribed, on grounds of expediency, within the narrowest possible limits (c 12)

The only limit to *jus imperii circa sacra* admitted by Grotius, other than the impossibility of controlling *actus interni*, is the *jus divinum*, but even commands of the sovereign which are contrary to the word of God oblige the members of the State—not indeed to obey, but at any rate to abstain from active opposition (c 3)

Antonius de Dominis

82. Views similar to those of Grotius are to be found in Marcus Antonius de Dominis, an archbishop of Spalato who went over to the Church of England (1560–1624) see his *De republica ecclesiastica libri X* (of which Part I appeared in London in 1618, Part II in London in 1620, and Part III in Hanover in 1622), more especially Book V, which assigns to the Church only a *potestas spiritualis*, and no *vera praefectura et jurisdictio*, cf also Book VI, cc 3–7

Conring on Church and State

83 For Conring's views see the Corollaries to his treatise *De constitutione episcoporum Germaniae* (Exerc. VII in *Exerc. de rep Germ. Imp*), of May 26, 1647 According to the Third Corollary, *Ecclesia in hisce terris vere non est aliqua respublica, sed naturam potius habet collegii in republica constituti* According to the Fourth, however, the 'authority and assent' of the *Respublica* are not needed *omni ex parte* for an 'ecclesiastical society', as they are for the institution of other 'colleges', and according to the Fifth, the 'universal church', in virtue of natural law and the law of God, is 'one body' in exactly the same sense as the whole of mankind or *universitas omnium bonorum hominum*

84 *Politia ecclesiastica* (Amsterdam, 1663sqq.), vols. I–IV.

85 Ibid. Part I, Bk. I, tract. I, c. I As distinct from the 'mystic and invisible Church', the 'external Church' is a 'visible collection', whose 'immediate foundation' is *consensus mutuus et arbitrium exserte declaratum eorum qui coëunt in ecclesiam*, though 'divine institution' is its 'ultimate foundation' (§4) The erection of the ministry also depends on consent *The collegial theory of Voetius*

86. Ibid §8 With strict logic, he rejects the theory of canon law in regard to the distinction of *ecclesia simplex* and *ecclesia collegiata* all churches are 'collegiate', and none of them has any advantage over any other (ibid I, I, tr I, c. 6) He also pronounces against all separate ecclesiastical fellowships and fraternities (II, IV, tr 4)

87 I, I, tr 2, cc 4–6. He describes the *populus seu corpus ecclesiasticum* as the 'Subject' or owner of ecclesiastical authority—not the 'people alone', nor the clergy alone, but the whole organised ecclesiastical people including its pastors

88 In I, I, tr I, c I, §8 Voetius distinguishes four possibilities (1) identity of the political with the ecclesiastical *corpus*, as in Israel, England, Switzerland and Geneva, (2) the recognition of the true religion as the only public religion, with toleration of different creeds and confessions, as in the Netherlands, (3) a heterodox political community, with toleration of the true Church, as in France, (4) a political community hostile to the true Church, as in most countries *Four possible relations of Church and State*

89 I, I, tr 2, cc 4–5

90 I, I, tr 2, cc 2, 5, 7–15, II, III, tr I, cc 3–5 He speaks accordingly of a separate *politia ecclesiastica, distincta a politia politica et oeconomica*, I, I, tr 2, c 7, §5

91 I, IV, tr 2, c I, §§1–2 Property belongs to the 'visible church', because the 'mystical church' is not capable of holding property It does not belong to *privati*, nor again to *collegia civica* or the *aerarium publicum* We may describe what belongs to the Church as *bona Dei* or *patrimonium Christi*, because Christ is the Head of the 'mystical body' of which all believers are members

92 Cf. Ludiomaeus Columnus, *Papa Ultrajectinus, seu Mysterium iniquitatis reductum a clarissimo viro Gisberto Voetio, in opere Politicae ecclesiasticae*, London, 1668 This work seeks to prove that the theory of Voetius, if it shows more piety, also betrays more absurdity, than that of the papalists Any theory which assumes two separate powers is unchristian *

* The real author of this work was L du Moulin (1606–80), who after studying medicine at Leyden and Cambridge was Professor of Ancient History at Oxford from 1648 to 1660, and afterwards lived at Westminster He also wrote a work, in English, on *The Rights of Churches*

§16. THE GENERAL THEORY OF THE GROUP (*VERBANDSTHEORIE*) IN NATURAL LAW

States as moral persons in a state of nature

1 See Spinoza, *Tract pol* c. 3, §§11–18; Pufendorf, *Elem* §§24–6, *De jure nat et gent.* II, c 3, §23, Thomasius, *Instit jur div* I, c 2, §§101sqq., Gundling, *Jus nat* and *Disc* c 1, §54, Hertius, *Comm.* II, 3, pp 21sqq , Becmann, *Med* c 2, J H Boehmer, *P. gen* c 2, §§3sqq , *P spec.* I, c 3, §22 n 6 (who speaks of 'a state of nature or liberty', involving a *species juris naturae*, as ing free and equal 'moral persons'), Wolff, *Instit* §§1088sqq , *Jus* Heineccius, *Elem* I, c. 1, §§21–2, II, c 1, §§1 and 21, Danes, *P spec* §§790sqq , Nettelbladt, *Syst. nat* §§1405sqq (*quaelibet gens, qua talis considerata, est persona moralis in statu naturali vivens, et plures gentes sunt plures istiusmodi personae*), Achenwall, II, §§210–88 (*jus naturale* exists among 'eternal societies', i e among *gentes* regarded as 'free moral persons'), Justi, *Natur und Wesen*, §§222–3, Locke, II, c 12, §§145–6 [of the *Second Treatise on Government*]

2 See the author's work on Althusius, pp 287sqq and 300sqq

3 On this point Spinoza (*Tract theol -pol* c 16 and *Tract. pol* c 2) agrees entirely with Hobbes

4 This is the view not only of Hobbes (see supra, p 85 and no 63 to §15), but also of Spinoza (*Tract theol -pol* cc 16, 17, 20 and *Tract pol* cc 3, 4, 5)

5 This is the reason why the German writers on natural law, though following Hobbes closely in other respects, from the time of Pufendorf onwards, always attack his conception of the state of nature Gundling comes nearest to Hobbes' conception (*Jus nat.* c. 3 and *Exerc* 4, pp 155sqq.), but he arrives at totally different results

Thomasius on the nature of Law

6 At first Thomasius regarded all law as the 'will' of a 'ruler'—treating *lex positiva* as the command of men, and *lex naturalis* as that of God, cf. *Instit jur div* I, c 1, §§28sqq and *Annot ad Strauch diss* I, pp 2sqq In his later days he continued to believe in the imperative character of positive law, but instead of describing *lex naturalis* as a divine command with 'external obligation', he now defined it as merely a *consilium producens internam obligationem*, or a *dictamen rationis*, of which God was the ultimate author but not the legislator cf *Fund jur nat* I, c. 5, §§28–81. [This later view involves him in some difficulties] Making a general division of the *normae* which limit the action of human will into the ethical, the political and the legal (ibid. cc 1–4), he proceeds to apply this triple division not only to positive rules, but also to the rules of nature (c 5, §§58sqq.); but he fails to make any real distinction between 'Natural Law' proper and 'natural ethics' or 'natural politics', because he cannot prove that Natural Law [regarded as a 'counsel' or 'dictate of reason'] possesses that attribute of being enforceable which he regards (c. 7) as essential [to law proper]. [We may compare with his change of front in regard to Natural Law a similar change in regard to customary law] At first he regarded customary law as only existing in consequence of the sanction of a sovereign (*Inst jur div* I, c 2, §109) afterwards, he allowed that it possessed the character of law even if it had no such sanction (e g in the case of customary law *inter gentes*), but he qualified this admission by adding that such customary law was a law without *obligatio*, cf. *Fund.* I, c 5,

§ 78, *Addit. ad Huberi Praelect Inst* 1, 2, nos. 7 and 12, and *Diss de jure consuet et observantia.*

7. This fact of external obligation is expressly emphasised by Gundling, c 1, §§47–50 (*obligatio interna et externa*), Becker, §§2, 5, Mueldener, 1, § 1 (*exactissime obligans*), J. H Boehmer, 1, *P gen* c 1, Achenwall, *Prol* §§98sqq, 1, §44.

8 This is the composite view which appears in Pufendorf, cf *De off hom et civ* 1, c. 2 taken along with c 3, and *J n et g* 11, c 3 taken along with 1, c 6 (God may be regarded as 'Sovereign', and *lex naturalis* as His *voluntas*, but apart from *lex divina positiva* there is also a *lex divina per ipsam rerum naturam hominibus promulgata*). It was the original view of Thomasius (supra, n 6), it appears in Alberti, c. 1, Cumberland, c 5, Becker, §§2–6, Mueldener, *Pos* 1, § 1 (*jus naturae est decretum voluntatis divinae per rationem promulgatum*), H. de Cocceji, *Prodromus*, S de Cocceji, *De princ jur. nat. univ*, *Tract jur. gent* Parts 1 and 11, *Novum systema*, 1, §§56–60 ('a command of nature and its author, declared to mankind by reason'), Kestner, c 1, J. H. Boehmer, *P gen* c. 1 (a 'norm' which proceeds from the 'will' of God, but 'is written in the hearts of men'), Schmier, 1, c 1, s 1, §3, Heineccius, 1, c 1, c 3, Achenwall, *Prol* and 1, §§7sqq (a true law of God, in the juristic sense) *Natural Law and human Reason*

9 This is a view which appears in Horn, *sanctitas divina*, and not *voluntas divina*, is the source of natural law, and human reason (as a relic of man's being originally in the image of God) is the means of knowing what it is (11, c. 2) The same view appears in Huber, he holds that there can be law even without a *Superior* or force (1, 1, c 1, §§2–5), and he regards natural law as a command of reason implanted in man by nature, and by God as the author of nature (ibid c 2) A similar view is also to be found in Gundling (c 1, §§4–11), and in Leibniz, who derives natural law from the nature of God, and regards command and enforcement as unessential (*Op* IV, 3, pp 270sqq, 275sqq, 294sqq.) Cf also Wolff, *Instit* §§39, 41, 67, and Montesquieu, *Esprit des Lois*, 1, cc 1–2 (*raison primitive... les lois de la nature dérivent uniquement de la constitution de notre être*) *Natural Law rationalised*

10. Cf e g Gundling, c 1, §§47–50, S de Cocceji, 1, §56 (*idque metu poenae*), Achenwall, 1, §44 (*sub comminatione poenae*)

11. When, as in Grotius (*Proleg* no 11 and 1, c 1, § 10) and his precursors (on whom see the author's work on Althusius, p 74), the assumption was made that there would be a Natural Law even if God did not exist, or if He were unjust, the logical consequence of that assumption was the abandoning of any idea that it was derived from the will or the nature of God, and this is what we find in Thomasius, *Fund* 1, c 6 [cf supra, n. 6] After Locke in England, and Rousseau and his successors in France, had contented themselves with merely invoking 'the order of nature', the connection of Natural Law with the idea of God tended also to disappear among German thinkers, it is not present, e.g in Justi, Scheidemantel, Schlozer, Hoffbauer or Fichte Kant definitely holds that the notion that God is the author of the moral law is untenable, for God is Himself under that law, and He is obliged to act by its rules (*Works*, VII, pp. 8sqq). *Natural Law secularised*

12 Cf Leibniz, *Nova methodus*, §74, and introduction to the *Cod jur gent.* 1, § 11, J. H. Boehmer, *P. gen* c 1, Schmier, *Jus publ univ.* 1, c 1, s 2, §§1–2, Achenwall, *Proleg.* §§98sqq, 1, §§34sqq, Fichte, *Works*, III, pp 145sqq

Rights under Natural Law

13 In regard to international law, there was unanimity on this point So far as the public law of the State was concerned, all the theorists who recognised a right of resistance to any breach of Natural Law by the sovereign sought to justify their view by assuming a return to the state of nature, and therefore to the right of self-help belonging to that state Cf the author's work on Althusius, pp 314–5, and esp Wolff, *Polit* §§433sqq , *Jus nat* VIII, §§1041sqq , *Instit.* §§1079sqq , Daries, §§710sqq , Achenwall, I, §2, II, §§200sqq , Scheidemantel, III, pp. 364sqq , and also Rousseau, III, c 10.

Natural Law as obligatory

14 For this reason Natural Law was declared to be a 'perfect law' with 'coercive power' cf Thomasius, *Instit jur. div.* I, c 1, §§103sqq , Gundling, I, c 1, §54, Achenwall, *Proleg.* §§98sqq and I, §§34sqq , Wolff, *Instit* §§80sqq. [One exception was made], in regard to the relation of the sovereign to his subjects, the opponents of any right of resistance held that Natural Law had only a 'directive power' [over the sovereign], and therefore only imposed an 'imperfect obligation', but at the same time they did not abandon the idea that this imperfect obligation was a real legal obligation cf Pufendorf, *Elem* I, d 12, §6, *J n et g* VII, c 5, §8, VIII, c 1, Thomasius, loc cit §§111–13, J H Boehmer, *P spec* I, c. 5, III, c 1, Schmier, V, c 1, s 1 and c 3, s 1; Kreittmayr, §§32–5.

15 This idea is definitely formulated in e g Mevius, *Prodromus*, III, §13, cf. also Montesquieu, *Esprit des lois*, I, c 2

16 Cf Pufendorf, *De off hom et civ* I, c. 3, *J n. et g* II, c 1, Thomasius, *Inst jur div* I, c 4, §§54–72, Becmann, *Med* c. 2, *Consp* p. 16, Hertius, *Comm* I, 1, pp. 61sqq (*de socialitate primo naturalis juris principio*), *Elem* I, s. 1, J. H Boehmer, *P gen* c 1 See also Mevius, IV, §35, and Mueldener, *Pos* II, §1, and (to some extent) Fénelon, c III and Montesquieu, I, c 2

Socialitas *and* Societas

17 Thomasius (*Inst jur div* I, c. 4) expressly warns his readers against confusing *socialitas* and *societas* As against Hobbes and Spinoza, the advocates of *socialitas* contend that the state of nature was a state of peace, but they admit that this peace was unstable, and that it might at any moment (as still happens between States) pass into a state of war Cf Pufendorf, loc cit , Hertius, II, 3, pp 21sqq , Thomasius, *Inst jur div.* I, c. [3], §§51sqq. and c 4, §§54sqq (later, however, in *Fund* I, c 3, §55, he states the view that the state of nature was 'neither a state of war nor a state of peace, but a confused chaos', which was like war, yet not without a tendency towards peace), J. G Boehmer, loc cit §38 The transition from mere *socialitas* to a definite 'society' is ascribed not to the operation of nature, but to reason and free choice, this is the view of Pufendorf, Hertius and Becmann (loc. cit) These thinkers also assume that there is no *societas* among States, cf Becmann, loc. cit , and Hertius, II, 3, pp 21sqq A different view, however, appears in Huber (I, 1, c. 5) and in Mevius (V, §§5–9, 18, 20), but they both regard *jus gentium* as being something more than mere natural law

Positive law based on Natural Law

18 The theory appears in Pufendorf, Hertius, *Comm.* II, 3, pp 21sqq.; Gundling, c 1, §§77–9 and c 3, J G. Boehmer, c. 2, §§8sqq., and other writers Cf also the view of Huber (I, 1, c. 3) that anything opposed to civil society cannot be Natural Law, because the *desiderium societatis* is natural. Strauch (*Op* no 16, *de juris nat et civ. conventia*) goes still further [in the way of connecting natural and positive law].

'Pure' natural law and 'Social' natural law

19. Thus Mevius distinguishes between *jus naturale primaevum* and *jus naturale secundarium et voluntarium* The latter is based on reason itself, and not on the mere fact of agreement, but its rules have to be determined by the

principle of 'social conjunction' (v, §§5–9) It is in this latter category that he places international law, assuming the existence of a *societas communis inter omnes populos* (ibid §§18–20).

Heineccius admits that natural law, in the narrower sense, refers only to free and equal individuals (I, c 1, II, c 1, §§1–10), but he holds that *jus gentium* [as distinct from Natural Law in this narrower sense] is *ipsum jus naturale vitae hominum sociali negotiisque societatum atque integrarum gentium applicatum* (I, c 1, §§21–22, II, c 1, §21)

To Daries, the 'moral state of man' is either 'natural' or 'adventitious', and the 'natural moral state', in turn, is either 'absolute' or 'conditional' Proceeding with his subdivisions, he next lays it down that the absolute state of nature, which is marked by 'liberty' and 'equality', may be either a state of 'solitude' or of 'society', and, in the same way, the conditional state of nature may be either 'non-social' or 'social' Finally, he classifies the 'civil state' as belonging to the last of these categories [i e it is a conditional state of nature of the social type], while he regards the state of the relations in which States stand to one another [i e the state of international relations] as a *status naturalis absolutus socialis* (cf *Praecogn* §§11–28, *P spec* §§790sqq)

Nettelbladt divides the whole body of 'natural jurisprudence' into that which is 'natural strictly so called' and that which is 'natural-social'. In his view, international law is a mixed body of law, composed both of *leges gentium stricte naturales* and of *leges sociales*—the reason being that the pure state of nature is here modified by the existence of a 'society constituted by nature' among all peoples (§§1419–24)

Achenwall distinguishes between the *jus mere naturale*, which is valid in a state of nature, and the *jus sociale naturale*, which is valid in a state of society, and includes the law of the Family, the law of the State and international law. At the same time, however, he holds that there is a sense in which pure natural law is itself social, for there is a *societas universalis* or *civitas maxima*—with God as its natural sovereign, and all men as its natural members—which lays down this *jus mere naturale*, and thus creates an obligation of sociability (cf *Proleg* §§82–97, I, §1, §§43–4, II, §1)

Hoffbauer has a complicated scheme (1) He starts from the exalted idea of a 'pure natural law' which is valid for all forms of 'rational existence'—including even other forms than man, if such were known—and is partly 'absolute' (pp 64sqq) and partly 'conditional' (pp 70 sqq) (2) Descending in the scale, he comes next to the 'applied Natural Law' of man (pp 86sqq.). (3) Here he distinguishes between an 'absolute' form (pp. 108sqq) and a 'conditional' (pp 120sqq). (4) He then divides the conditional form of applied natural law into the 'universal' (pp 122sqq.) and the 'particular' (pp. 155sqq). (5) Finally, he subdivides the 'particular conditional form of applied natural law' into the 'extra-social' (pp 156sqq) and the 'social' varieties (pp. 186sqq.). Only when he reaches this fifth and last stage in his process of classification does society first appear in his scheme A final reference may be made to Cumberland, c 5

Society as an 'artifice'

20. Gundling, for example (c 3, §§11–60), begins with a primitive state of perfect liberty and equality, and explains all forms of connection between human beings as having been instituted by conscious agreement, in consequence of the discoveries made under the pressure of necessity. He describes the *status civilis* accordingly as a work of art and a *status artificiosus*.

Schmier (I, c 1, s. 1, §§ 1–3) also assumes a state of nature in which free and equal individuals have no form of union, but he believes that the whole of mankind never lived, or could have lived, in a pure state of nature at one and the same time.

Locke's state of nature

21 Locke (*Second Treatise*, II, c 2) regards the state of nature as the state which existed previously to the erection of civil society, but he also regards it as a state which still exists in the absence of civil society. From the latter point of view, he depicts the state of nature as a relation of man to man such as still occurs to-day, e g when a Swiss and a Red Indian meet in the backwoods of America (§ 14) He also speaks, it is true, of 'natural society'; but the only conclusion he draws from that idea is that men have a negative duty not to disturb or oppress one another (§§ 4–5) That he does not assume the existence of any real *community* is shown by his remarks about the substance of Natural Law, as something older and higher than all 'social laws' (ibid §6, c. 2, §§6–13, c 3, §§16–21, c 5, §§25–51, c 4, §§22–4). A similar view is to be found in Sidney, c 1, ss 2 and 9, c II, ss 1 and 2

Rousseau's state of nature

22. Rousseau has already attained these ideas in the *Discours* of 1753, and repeats them in the *Contrat Social* [of 1762], I, c 1 sqq He admits, indeed, that the Family is a natural *société*, but only until such time as the children are adults. Filangieri says much the same in the state of nature there was no inequality other than physical, no law other than natural, no bonds other than those of friendship, necessity and the family· alas, that things could not remain as they were (I, c 1) See also Sieyès, I, pp 131 sqq. and 205 sqq

Primitive liberty as conceived by German thinkers

23 Thus Justi (*Die Natur und das Wesen*, §§ 1–18) begins with an original state of nature which was marked by liberty and equality—a state in which men were half animals, and had no natural instinct for social life. Knowledge of the advantages of union first impelled them, after they had attained some degree of reason, to erect some form of society At first, the existence of such a society imposed no limits on natural liberty, and even to-day that government is still the best which realises the purpose of the State with the fewest possible limitations upon natural liberty. Justi takes a similar line in his *Grundriss* (§§5 ff), and he interprets international law in a corresponding sense (ibid §§222–3). Frederick the Great, writing in 1777, similarly assumes a pre-political condition, with no *société* (*Oeuvres*, IX, p 195)

In the view of Kreittmayr (§§2 sqq) the State is not based on *jus naturale absolutum*, it is based on history, as a *res mere facti* Scheidemantel (I, pp. 44 sqq , 56 sqq , 68 sqq) holds that the State is not a necessity of man's nature, and that the Law of Nature does not impose upon him any binding obligation to renounce his natural liberty. A. L. von Schlözer regards primitive man as *homo solitarius*, and treats all social institutions as artificial inventions (pp 31 ff). Cf also C von Schlözer, *De jure suff* §3

Fichte on the origin of Right or law

24. *Grundlage des Naturrechts* (1796–7), vol I, Introduction and pp 51 sqq (*Works*, III, pp. 7 sqq and 17–91), where Fichte argues that the rule of Right, or law,* is deduced without the aid of morality, and yet without any surrender of the unity of law and morality That unity depends on the living self-consciousness of the Ego The Ego is one, but in the form of subjective instinct [*Trieb*] it produces morality, while in the form of force (as a fact of

* *Recht* here is more than our English 'law' (1) because, on its 'objective' side, it has a connotation of something inherently 'right' and (2) because it implies, as its other or 'subjective' side, the right of the individual.

objective existence) it produces law. In all essentials, Fichte maintains his earlier theory of the origin of the rule of Right in his later *System der Rechtslehre* [lectures delivered in 1812], printed in his *Posthumous Works*, II, pp 495sqq.

25. *Works*, III, pp. 92sqq cf *Posthumous Works*, II, pp 500sqq

26 *Works*, III, pp. 128sqq the original rule of Right is 'the absolute right of the personality to be nothing but a cause in the world of thought', i e the right of the absolute will, but the original rights of different persons cancel one another, unless each person limits himself.

27. *Works*, III, pp 92sqq. it is not an 'absolute', but a 'problematical' command.

28 *Works*, III, pp. 92sqq., 140sqq , 166sqq. Subsequently, however, Fichte came to regard the existence of a legal community as an 'absolute law of the reason' and 'a necessity of thought', and he accordingly made the rule of Right issue in an obligation to make and keep contracts. But he still continued to hold the firm conviction that 'a state of law is never produced by mere nature . without art and free will, or without a contract' (*Posthumous Works*, II, pp 495–500) *Fichte's later view of law*

29. *Works*, III, pp 137–49 *Posthumous Works*, II, p. 499. The Law of Nature is not law proper, inasmuch as the Ego is absolute, Natural Law has no sanctions other than loyalty and good faith, which lie outside the bounds of law any right of compulsion which each can exert upon each is not enough [to constitute a genuine legal sanction]. On the other hand Right or law which is sanctioned by the force of the State is never Right unless it is based on reason Both propositions are therefore true (1) that 'all law is purely the law of reason' and (2) that 'all law is the law of the State'. *Natural and positive law in Fichte*

30 Cf *Works*, VII, pp. 8sqq , and see also, on the relation of law to morality, pp 11sqq., 15sqq., 26sqq and 182sqq , in which a particularly strong emphasis is laid on external compulsion as the essential attribute of law. *Kant on law*

31 *Works*, VII, pp. 62sqq., §§ 14–17, p 131, §45.

32 *Works*, VI, pp 320, 415, VII, p 54, §8, p. 130, §44, p. 107, §41 Fichte also used this principle in order to deduce from it a duty of States still living in a state of nature (in their external relations to one another) to form some union, cf VI, pp 415sqq , VII, p 162, §54, p. 168, §61

33 *Works*, VII, pp 20, 133. the will of the rational individual is its own legislator, but when it proceeds to enact a law for itself, it should always adopt a maxim which is qualified to be a *universal* law.

34. *Works*, VI, pp 329, 409, VII, p. 133, §47

35 On the position of Right or law before the State exists, see *Works*, VII, p 130, §44

On the State's obligation to respect the law of Reason which is given *à priori*, see VI, pp 338, 413, VII, pp. 34, 131, §45, p 136, §49. On the inviolability of the principles of the liberty, equality, and independence of every individual, and on the illegality of institutions (such as slavery, and also hereditary nobility) which are contrary to these principles, see VI, pp 322sqq , 416sqq., VII, pp 34sqq , 147sqq *Kant on the State and the law of Reason*

36. See Pufendorf, *De off hom et civ.* I, c 12, §§2–3, *J. n et g.* IV, c. 4, §§1–14, c 5, §§2–10, Thomasius, *Inst. jur. div.* II, c. 9, §§58–95, *Fund* II, c 10, §§5–7; J H Boehmer, *P. spec.* II, c. 10, Heineccius, I, c. 9, Wolff, *Instit* §191· Nettelbladt, §§208sqq., Achenwall, I, §§106–8, 116 (*omnes res nullius*, *Kant on property*

usus omnium), Kant, VII, pp 49, 57, 61, 66 (Kant accepts *communio fundi originaria*, as a principle involving an original common ownership of the surface of the earth, but he does not believe in a *communio primaeva*, in the sense of a community of property erected at a point of time and contractually established by the pooling of private possessions.)

Survivals of original community

37. See e g Pufendorf, *J n et g* IV, cc 4–6 and VIII, c. 5, §7, on the remnants of the original community of property which may still be traced in the right of the State to ownerless things and in its *dominium eminens*, Wolff, *Instit* §§300–12, on the continuance of 'primitive community' in regard to *res usus inexhausti* and the sea, and again in the case of *jus necessitatis* and *jus innoxiae utilitatis*; and Nettelbladt, §§471 sqq.

38. Wolff (§§194sqq), though he has previously depicted the original community of property as *negativa*, sees no objection to making private property develop out of it by an act of division which is due to supervening needs, and is thus compatible with the law of nature

Locke on property

39. According to Locke (II, c 5, §§25–51) the individual may acquire property by a legitimate title in the state of nature Though all things are common, he has a private right in his person, and he may thus acquire things [for himself by annexing them to his person, i e] by means of labour, which also includes occupation No contract or law need precede such acquisition; but limits are set to the acquisition of private property in virtue of Natural Law (1) by the measure of the individual's own need, and (2) by the requirement that there shall be a supply of equal and equally good things for all (Locke thinks that these conditions are satisfied so far as land is concerned.)

General view that property is pre-social

40 See Heineccius, I, c 9, Schmier, I, c 1, s 2, §3, Nettelbladt, §§215sqq , Achenwall, I, §§110sqq (private property comes into existence by 'conditional Natural Law' [cf. n 19 supra], first by way of occupation, and then in v of c

The French physiocrats (Quesnay, Mercier de la Rivière, Dupont de Nemours and Turgot) are especially emphatic in proclaiming the origin of private property in the state of nature, and the duty of the State to recognise it in virtue of *les lois naturelles de l'ordre social*, cf Roscher's *Wirthschaftsgeschichte*, pp 480sqq., and Janet's *Histoire de la Science politique*, II, pp 684sqq.

Rousseau on property

41. Rousseau, *Contr soc.* I, c 9, but the theory already appears in the *Discours* [of 1753] Rousseau, however, regards the establishment of private property by an act of appropriation in the state of nature as a usurpation, which is only legitimised when, in the act of concluding the social contract, all men surrender to the sovereign all their belongings as well as their powers, and receive them back again from the sovereign as legal possessions under the limits determined by the law of the community

Möser on property as the basis of the State

42. Justus Möser always treats property in land as the basis of perfect liberty. he regards land-owners as the 'original contracting parties' of the State, and other owners as shareholders in the State-partnership (in which originally the shares were only shares in land, though later there came to be also shares in money), and he therefore considers them to be the only fully qualified citizens (cf. his *Patriot. Phant.* II, no. 1, III, no 62, IV, no. 43)

Kant on primitive property

43 According to Kant (*Works*, VII, pp 53sqq. and 62sqq.) there is already a real, if only provisional, *meum* and *tuum* in the state of nature, which first acquires a title of prescription [*peremptio*] and a guarantee in the civil state, cf. also pp. 56sqq. and 64, on occupation as an original method of acquisi-

tion (but one which only exists in so far as the possession thus acquired can be actually defended)

Property as State-created

44 Thus Mevius (*Prodromus*, v, §42) derives private property from an act of concession by a *societas civilis* (under reservation for cases in which the *societas* itself is in need) Horn (II, cc. 3–4 and 6) ascribes its origin to an act of distribution by the sovereign, who has received authority from God for that purpose [cf Paley, *Principles of Moral and Political Philosophy*, Book III, c IV], and who continues to enjoy a real 'eminent domain' Bossuet (1, art 3, prop 4) finds its source in a creative act of the government, and Alberti (c. 7, §19) derives it from a direct declaration of will by the community, which at one and the same time establishes property and the limits of property.

Property as based on contract

45. Pufendorf (loc cit) requires a *pactum tacitum* to bring private property into existence, and Gundling (c 3, §§27–31, 39–42, and c 20) makes *dominium*, like *imperium*, originate in a 'pact' Similarly A L von Schlozer argues (p 46, §11) that rightful acquisition of property first becomes possible after its original community has been abolished by contract, for even occupation, and the appropriation of things by labour, were only admitted as proper titles after other persons had 'renounced their joint right therein' (p 49).

Fichte on property

46 According to the theory originally developed by Fichte in his *Naturrecht* (*Works*, III, pp. 210sqq), but also maintained in his later period (*Posthumous Works*, pp 528sqq , 592sqq , 594sqq), property arises from a contract of property, which is to be regarded as a part of the political contract, and thus it becomes possible only after the original right of each man to everything has been removed by an act of renunciation Even so, however, 'absolute' property only exists in money and the value of money in exchange (in his *Rechtslehre* Fichte makes it also include house property), property in land still remains subject to obligations and limitations, and is only a 'relative' species of property What is true of the right to own land is also true of the right to practise trade and industry, and the State has therefore to distribute rights of pursuing trades among its members, and to organise their industry, in order to satisfy the claim which all men have to subsistence This constitutes the basis on which Fichte subsequently erected (in 1800) his theory of *Der geschlossene Handelsstaat* ('the close Trading-state'), with its economic omnipotence [cf W Wallace, *Lectures and Essays*, pp. 427sqq.]

Theories of Society as original and divine

47 In Germany Praschius is conspicuous for his advocacy of the fundamentally social character of Natural Law The primary principle of that law, he holds, is love, and the greatest of the duties based on that principle is devotion to others and especially to the whole. Society is God's will it is, even more than the individual, the mirror of the Trinity, and the aim of nature's plan is not the individual, but society, cf §9, *add triplex de vi et amplitudine juris socialis*, p. 47. The view of Placcius (Book 1) is similar. Mevius (v, §4), Becker (§§5 and 12) and Alberti (c 2, §9 and c 10, §1) also assume the existence of an original community, of which traces continue still to exist in civil society

According to Kestner, the source of Natural Law and society is not *socialitas* or *consensus*, but the will of God (c 1) Originally there existed a primitive *societas humana* which God had founded, the *imperium* in this society belonged to 'all mankind', and coercion was applied to misdoers by *caeteri collective*

sumpti (c. 7, §2). After the disintegration of this unity the *imperium*, which 'hitherto belonged to all without distinction', passed to the separate 'societies' which were now established (c. 7, §3).

The two Cocceji (Henry and Samuel) similarly reject the principle of 'sociality', and base all social authority on the power over individuals originally bestowed by God on the whole body of mankind at large—a power which subsequently passed to separate peoples, when they arose, and from them in turn passed to their rulers Later, however, Samuel Cocceji developed the view that political authority arises from the *imperium* over its own members originally bestowed by God on each family as a *corpus*—this *imperium* being afterwards transferred, with the aid of God's intervention, to the union of heads of families, and then in turn from this union to a Ruler (*Novum syst.* §§280, 612–13)

In France we find Bossuet regarding *société* as the *fait primitif*, and explaining the origin of *diverses nations*, as *sociétés civiles*, by the human passions which led to the disintegration of the primitive fraternal union of all mankind (1, art 1–2).

In England, we find Filmer, in his *Patriarcha*, deriving all social authority from inheritance of the *patria potestas* bestowed by God upon Adam

Individualism in eighteenth-century Germany

48 This individualism appears in Mevius (v, §§23, 25), Alberti (loc cit), Kestner (op cit §3), S. Cocceji (*Nov syst* III, §§199–207, where the theory of a contract is adopted). Thomasius, in spite of his assumption that there originally existed, *in statu integro*, a community between God and man and a community of all men with one another, and that this double community was the source of a social law of nature (1, c 2, §§27–43 and 51–54), none the less applies the individualistic theory of contract in his *Institutes of Divine Law*, and in his later writings he drops his whole theory of the *status integer*, on the ground that such a state is beyond our knowledge

Even in Leibniz and Wolff

49 Leibniz derives the existence of law from the community, and regards all communities as organic parts of the Kingdom of minds in the Universe at large, which constitutes a world-State under God's government (*Bruchstück vom Naturrecht*, in Guhrauer, 1, pp 414sqq , and Introduction to the *Cod. dipl jur gent* , in Dutens' edition of his *Works*, IV, 3, pp 287sqq) At the same time he defines the State as a contractual association (*Caesar -Fürst.* c 10), he makes the basis of punishment consist in the promise made by each individual to observe laws and legal decisions (*Nov. meth.* II, §19), and he regards *conventio populi* as the source of the validity of all civil law (ibid §71)

The idea of society as something naturally given still survives in the theory of Wolff, and it even leads him to think that peoples living in a state of nature form a natural society, which, as *civitas maxima*, possesses an *imperium universale* (*Instit* §1090). But his whole argument proceeds, none the less, on the assumption of equal, free, and independent individuals (*Instit* §§70 and 77, *Jus nat* 1, §§26sqq)

Individualism of Montesquieu

50 *Esprit des lois*, 1, cc. 1–3 Natural laws exist before man and before society: pure natural law is valid for *un Homme avant l'établissement des sociétés*, and it produces, first the desire for peace, then the satisfaction of the needs of sustenance, then the beginnings of connection, and finally a *désir de vivre en société*. In society, because the feeling of weakness and equality disappears, wars arise, both within and without; and these produce on the one hand international law, and on the other a civil law which varies considerably [from one State to another], according to circumstances.

51. See Moser's *Osnabrück History* and his *Patriotic Fantasies* supra, n 42. For his objection to the law of Reason see esp. *Patriot Phant.* IV, no 30, 'on the important distinction between actual and formal law'.

52 Vico starts from God and human nature he believes that the primitive ideas of *bonum* and *aequum* continue to survive, even after the Fall, as ideas of justice and sociability, and he regards utility not as the source, but only the occasion, of law and society *Vico and Ferguson*

Ferguson, rejecting the supposed state of nature and the original contracts, prefers to take men as he finds them, i e as living in society, and he regards social progress not as the opposite of nature, but as its consummation (*Essay*, I, c 1) But he too is inconsistent, and having rejected contract and a state of nature, he proceeds to ascribe the historical beginning of society to the operation of two instincts—the instinct of affection which unites, and that of independence which divides (ibid cc 3–4).

53. Herder's *Ideen zur Geschichte der Menschheit*, IX, c 4

54. Cf supra, p. 46 and nn 60 and 61 to § 14; Schmier, II, c. 1, s 3, §§ 1–3, Heincke, I, c 2, §§9–11

55. Thus Bossuet (I, art 3, prop 1–6), in agreement with Hobbes, holds that the State first comes into existence through the complete and irrevocable subjection of all men to one sovereign, under the compulsion of nature, previously there had only been an anarchical sort of multitude, which possessed no sovereignty before this act of subjection, just as it possesses none afterwards Unlike Hobbes, however, he ascribes the origin of sovereignty to the will of God, and not to a contractual act of surrender of rights. A similar view is to be found in Fénelon, chap. VI cf also Alberti, c 14, § 3 *Bossuet on the origin of the State*

56 Horn, II, c. 1 for further details see the author's work on Althusius, pp. 70–71

57. Cf supra, nn 47–49 and 52–3 to this section.

58. Cf. supra, p 60, Spinoza, *Tract theol -pol* c 16, *Tract pol* cc 3–4, Gundling, *J.n* c 35 and *Disc* c 34

59 Cf supra, p 46, and n 63 to § 14, Locke, II, c 7, §§87–9 (the surrender by all of their natural right to self-help, and the surrender of power to the community, constitute civil society) and also c 12, Sidney, I, s. 10, II, ss 4, 5 and 20 (all society is constituted by the free association of individuals, who 'recede from their own right')

60. Cf supra, p. 46, and n. 63 to § 14, Huber, I, 2, c 1, Pufendorf, *J. n et g* VII, cc. 2–3, *De off hom. et civ* II, c 6; Thomasius, *Instit jur. div.* III, c. 6, Hertius, *Comm* I, 1, p 286, § 1 (*societas multorum hominum mutuis eorundem pactis conflata, et potestate instructa*), Becmann, cc 5–6, J G Wachter, *Orig* p. 34 (*civitas nihil aliud quam multitudo hominum majoris utilitatis et securitatis gratia potentias agendi suas naturales invicem jungentium ad producendam mutuam et communem felicitatem*), J. H Boehmer, *P. spec* I, c 1, Heineccius, II, §§ 14, 109sqq , Wolff, *Instit.* § 836, Daries, *Praecogn* § 24, *P spec* § 655 (*tum voluntates tum vires in unam transtulerunt personam vel physicam vel moralem*), Nettelbladt, *Syst nat.* § 115; Achenwall, II, §§2, 9, 11, Kreittmayr, § 2 *The community as a mere aggregate*

61. *Contr soc* I, c 6 (*l'aliénation totale de chaque associé avec tous droits à toute la communauté*), III, c 18, IV, c. 2

62. *Contr. soc.* II, c. 5. The individual, it is true, has no right to commit suicide, but he has a right *de risquer sa vie pour la conserver* On this principle, we may say that the man who is willing to preserve his life at the cost of others must also risk losing it for the sake of others, if that be necessary. His *Rousseau on punishment*

life, after the conclusion of the contract, is no longer a simple *bienfait de la nature, mais un don constitutionnel de l'État* the sovereign has now a share in deciding when it is to be sacrificed. Thus even capital punishment has a basis in consent, though it is also a sort of war against *un ennemi public*

68. Beccaria, §2. In addition to the argument derived from the fact that suicide is wrong, Beccaria also presses into his service the assumption that the individual, in entering civil society, desired to incur the least possible sacrifice of his liberty

State-power a pool of individual powers

64 Even Montesquieu himself had suggested no other way [of explaining social authority], for according to the *Esprit des lois* (I, c 3) *la réunion de toutes les* forces *particulières forme ce qu'on appelle l'État politique les forces particulières ne peuvent pas se réunir sans que toutes les* volontés *se réunissent, la réunion de ces volontés est ce qu'on appelle l'État civil*

Similarly Justi (*Natur und Wesen*, §§23–6) contends that the act of union in a moral body, which constitutes the moral basis of the State, depends on the union of many wills in a single will, and of all individual powers in a single power, this is the difference between the State and the state of nature, in which each will stands by itself.

A. L von Schlözer (pp 63sqq and 93, §1) and C von Schlözer (§11) both insist on the origin of the State in a *unio virium*, which produces society, and a *unio voluntatum*, which creates authority

The State as a share-company

65 Cf Justus Moser, *Patriot Phant* III, no 62, on 'peasant properties considered as a form of share-holding' All civil societies, he argues, are like share-companies the citizen is one who is a shareholder Originally there were only shares in land [cf supra, n. 42] subsequently, money-shares came into existence also, and nowadays all belongings, and even our bodies, are part of the capital A slave [*Knecht*] is a man without a 'share' in the State, and therefore without losses or profits, but this contradicts religion no more than it does to be in the East India Company without holding a share The basis of civil society is an express or tacit contract of society between the associated owners of land, who invest their properties as whole or half or quarter shares, and a body of directors is instituted for the purpose of keeping up and getting in the contributions cf II, no 11.

Compare also Sieyès (1789), I, pp 283sqq. and 445sqq Individuals constitute a nation, as shareholders a company the active citizens are 'the true shareholders in the great social undertaking', and the passive citizens (wives, children and foreigners) are only protected persons Sieyès is never tired of repeating that political authority is 'constituted' by individuals, and only by individuals, and that the individual will forms the only element in the general will (cf. I, pp 145, 167, 207, 211, II, pp. 374sqq.).

Fichte's early individualism

66 In his *Beiträge* of 1793 ['Contribution to the judgment of public opinion on the French Revolution'], Fichte derives the State, as he also derives law, from the individual will, since 'no man can rightfully be bound except by himself' (*Works*, VI, pp. 80sqq , cf also pp 101, 103sqq , 115sqq) In the same way he makes the beginning of the State, under the régime of Natural Law, depend on contracts, under which individuals agree to pool a part of their rights—renouncing the residue of their property in return for the guarantee of a fixed part, and pledging themselves to pay a fixed contribution to the protecting authority (*Works*, III, p 207, cf II, pp. 109sqq. and III, pp. 269sqq)

In his *Grundzügen* of 1804–5 ['The Characteristics of the present Epoch']

we find a change: the State is not to be interpreted, 'as if it were based on this or that set of individuals, or as if it were based on individuals at all, or composed of them' (*Works*, VII, p 146)

Kant bases the State on individuals

67. See Kant's *Rechtslehre*, §47 (*Works*, VII, p. 133), on 'the original contract by which all the members of a people (*omnes ut singuli*) surrender their external liberty, in order to receive it back again at once as members of a commonwealth, i.e of the people regarded as a State (*universi*)'. [Kant adds that the individual, by this seeming surrender, 'has totally abandoned his wild lawless freedom in order to find his entire freedom again undiminished in a lawful dependence, that is, in a condition of right or law—undiminished, because this dependence springs from his own legislative will'.]

The Two Contract theory

68 This is the theory which appears in Huber, I, 2, cc 1–2 (with a division of the contract of association into the three stages of a treaty of peace, a union of wills and the formation of a constitution, c 1, §§1–13), Becmann, c. 12, §4, J H Boehmer, I, c 1, Wolff, *Instit* §§972sqq, *Jus nat.* VIII, §§4sqq, S Cocceji, *Nov. syst* III, §§612sqq and 616sqq, Daries, *P spec.* §659, Nettelbladt, §§1124sqq; Heincke, I, c 2, §§1sqq, Scheidemantel, I, pp 63sqq

According to A L von Schlozer, pp 63sqq and 73sqq, the civil society established by the *pactum unionis* lasts for centuries without any gover courts or coercion, until disturbances appear and the State is erected by a *pactum subjectionis*, cf. also pp 95, 96 and 173sqq

The distinction between the two contracts finds an echo also in Justi, *Natur und Wesen*, §§23–7.

In Sidney (c 1, ss 8, 10, 11, 16, 20, c II, ss 4, 5, 7, 20, 31, and c III, ss 18, 25, 31) and Locke (II, c 7, §§87sqq, c 8) the contract of subjection recedes into the background in comparison wi h the contract of union, but it is by no means entirely abandoned [More e actly, we may say that Locke uses the conception of Trust, and not that c f Contract, to explain 'subjection' The trust is a conception peculiar, o i the whole, to English law In private law [*Privatrecht*] the trust means tha t *A*, as trustor, vests rights in *B*, as trustee, for the benefit of *C*, as *cestui que tr ist* or beneficiary of the trust In public law [*Staatsrecht*], to which Locke may be said to transfer the doctrine of trust, the People or 'Public' (which is both the trustor and the *cestui que trust*) acts in its capacity of trustor by way of conferring a 'fiduciary power' on the legislature (which thus becomes a trustee), for the benefit of itself, and all its members, in its other capacity of *cestui que trust* or beneficiary of the trust This 'trust' conception pervades English political thought in the eighteenth century, not only is it applied internally, to the relations between the Public and the 'supreme legislature' it is also applied (for example by Burke) externally, to the relations between Great Britain and India, which is regarded as held in trust for the benefit of the people of India

[Locke's theory of Trust]

A trust is not a contract, and the trustee does not enter into relations of contract with the trustor—or with the beneficiary. Roughly, he may be said to consent to incur a unilateral obligation—an obligation to the beneficiary which, if it implies the trustee's possession and vindication of rights against other parties on behalf of that beneficiary, implies no rights for the trustee himself on his own behalf. If therefore political power be regarded as a trust, it follows that the Sovereign has not entered into a contract with the People, or the People with him—whether we regard the People as trustor or as beneficiary of the trust. The trust, in its application to politics, leaves no

room for a 'contract of subjection' We may say that Locke did not assign a contractual position to the sovereign because it would have given him rights of his own, derived from the contract, and he had no wish to vest the sovereign with *eigenes Recht.* Conversely we may say that Hobbes (who equally leaves no room for a 'contract of subjection') did not assign a contractual position to the People because it would have given it rights of its own, and he had no wish to vest the People with *eigenes Recht*]

69. See Pufendorf, *De off hom. et civ* II, c 6, *J. n et g* VII, cc. 2 and 5, §6 The same intercalation of constitution-making appears in Thomasius, *Inst. jur. div.* III, c 6, §§29–31; Hertius, *Elem.* I, s 3, *De modo const.* s 1, §§2–3; Schmier, I, c 2, s. 4, §3, Kestner, c. 7, §3; Heineccius, II, c. 6, §§109–12, Ickstatt, §§11–12.

70. This is the view of Achenwall, II, §§91–8, and of Hoffbauer, pp 187–207.

71 See supra, p. 60 and n. 147 to §14; cf also Spinoza, *Tract. theol -pol.* c 16, *Tract pol* c 5, §6, cc. 6, 7, §26, c 11, §§1–4 The same view appears in Houtuynus, *Pol. gen* §99, no 14, Titius, *Spec. jur publ* VII, c 7, §§17sqq and note to Pufendorf, *De off. hom. et civ* II, c. 6, §8, Gundling, *J nat.* c 35 and *Disc* c 34, §§1–17

The One Contract theory

72. Cf Rousseau, I, cc. 5–6 and III, cc. 1, 16–18 (with the author's work on Althusius, pp 116–17 and p 347 n 50). Frederick the Great also believes in a constituent *pacte social* (*Oeuvres*, IX, pp 195sqq., 205), and the idea also appears in Filangieri, loc cit, Moser, *Patriot. Phant* II, nos 1 and 62, and Sieyès, I, pp. 129sqq The contractual theory of Fichte also supposes only a single contract of all men with all men, the 'contract of state-citizenship', but this single contract is composed of three fundamental contracts—that of 'property', that of 'protection', and that of 'association' (*Works*, III, pp 1sqq and 191sqq, but in the *Posthumous Works*, II, pp 499sqq, his view is somewhat different). Kant always interprets the political contract as a single *pactum unionis civilis*; *Works*, VI, p 320, VII, p. 133

Psychological motive and legal act

73. This is the line of thought which appears in Huber, I, 2, c 1, §§1sqq (man's innate idea of justice and his natural desire for society both impel him to the making of contracts, which remain, however, free acts of his will), Schmier, I, c. 2, s 4, §2 (although the natural instinct for company which God has planted in man impels him towards society and the State, it is a matter of liberty for the individual whether *inter socios sese jungere et alienum imperium agnoscere velit*) S. Cocceji, op cit III, §200 (*natura mediate per pacta*), Heincke, I, c 1, §§1sqq. (*ipsa lex naturalis* is the *causa impulsiva*, and *pactum* the *modus constituendi*) The same is also true, to a certain extent, of Grotius, and of all the advocates of the theory of 'sociability', cf supra, n 16 to this section.

74. See Hobbes, *De cive*, c 1sqq., *Leviathan*, cc 13–14, Gundling, *Jus nat* c 35, *Disc* c 34, Kestner, c. 7, §3; Daries, §657 Similar ideas are to be found in Thomasius, *Inst jur. div* III, c 1, §§4–10 and III, c. 6, §§2–28 (it is not an *impulsus internus* which brings the State into being—for nature impels men, on the contrary, towards liberty and equality—but the *impulsus externus* of fear and necessity) Compare Scheidemantel, I, pp. 44–70 (the foundation of States is due in the first place to fear, and secondarily to other impulses leading men to renounce their natural liberty, but it is only achieved by free legal action)

J. H. Boehmer (*P. spec.* I, c. 1) thinks the primary cause of the founding

of States to be *violentia improborum*, first producing bands of robbers, and then associations for mutual defence against these bands, and a similar view occurs in Heineccius, II, c. 6, §§ 100–4, and in Kreittmayr, § 3.

75. Thus Pufendorf regards *socialitas* as the primary and *metus* as the secondary cause of the founding of States, but he makes consent the constitutive factor, *J n et g* II, cc 1–2, VIII, c 1, *De off hom et civ* II, cc. 1, 5 Cf. also Locke, II, c 7, §§ 87 sqq. and c 9

76. Kant, *Works*, VI, pp 320, 415, VII, pp. 54, 62 sqq , 130, 162, 168

77. Just as Althusius had already insisted (*Polit.* c 1, §§ 28–9) that union in a civil society came about *ultro citroque*, so the voluntary character of the conclusion of a contract is strongly emphasised, on the one hand by [the absolutists] Hobbes, Spinoza, Gundling, etc , and on the other by [the radicals] Sidney, c II, s 5, and Locke, II, c. 8, §§ 95 and 99 Wolff (*Instit* § 972) and Achenwall (II, § 93) also speak of the *liberum arbitrium* which is the decisive factor in the foundation of society Pufendorf (*J n et g* VII, c 2, § 7 and *De off hom et civ* II, c. 6, § 7), Schmier (see n 73 to this section) and many other writers expressly reserve the right of every individual to stand aloof and remain in the state of nature J H Boehmer denies the 'absolute necessity' of forming a State. Scheidemantel (I, pp 68 sqq) thinks that the State is not a necessity of human nature, and that the law of nature imposes no inevitable duty of surrendering liberty it is only in certain circumstances that the State is necessary Rousseau (*Contr soc* I, c 6) insists even more upon liberty he goes to the length of proclaiming (ibid IV, c 2) that *l'association civile est l'acte du monde le plus volontaire* the man who opposes it cannot be compelled to join, but he is *étranger parmi les citoyens* The same view recurs in Moser, A L von Schlozer and Sieyès, but Fichte goes furthest, holding that it is inconceivable that there should ever be any other legislator for an individual than his own will and his own deliberate and permanent purpose (*Works*, VI, pp. 80 sqq. and 101), and that the conclusion of the contract of State-citizenship is therefore purely a matter of free will (*Works*, III, p. 201). *General view that society is the resul of a free legal act*

78. According to Hobbes, Becmann, Gundling, etc , but equally also according to Rousseau (*Contr soc.* I, c 6), an understanding of the impossibility of the state of nature precedes the formation of the contract. In Spinoza (*Tract. theol -pol* c 16, *Tract pol.* cc 3–4) reason takes a foremost place In Sidney (II, s 4), Locke (II, cc. 7, 9), Wolff (*Jus nat* VIII, §§ 1 sqq) and Achenwall (II, § 93), a process of deliberation and reflection, leading to a sense of the utility of social life, is supposed A. L. von Schlozer speaks of the State as 'invented' In Fichte and Kant reason rules in full sovereignty *The act a calculated act of reason*

79. Cf supra, p. 105

80. Cf. supra, p. 106.

81 Cf supra, pp. 106–107.

82. This is an admission which appears in Huber, I, 2, c 1, §§ 33–5 ('on occasions'), Pufendorf, *J. n et g.* VII, c 2, § 20 and *De off. hom et civ.* II, c. 6, § 13, Titius, *Spec jur. publ.* IV, c. 10, §§ 2 sqq , VII, c 7, §§ 17 sqq , and Notes to Pufendorf's *De off hom. et civ.* II, c 6, § 8, Schmier, I, c 2, s. 4, § 3, no 188; Locke, II, c. 8, §§ 101–12, Heincke, I, c 2, §§ 2 sqq ('as a rule'), Justi, *Natur und Wesen*, § 27 (contracts, resolutions and decrees are not essential rules came into being afterwards, for the most part gradually and tacitly) *The idea of a tacit contract*

83 Cf. Huber, I, c 1, §§ 14–26, Hertius, *De modo const* s 1, §§ 4–5, p 289, Sidney, c. 3, s. 31 (until consent is there, the union only exists *de facto*), *Force and consent*

Locke, II, c 8, c 17 (until that time, there is only the appearance of a society); Achenwall, II, §98 Cf also Rousseau, I, c. 3, Heineccius, II, c 6, §§106 and 113, and A L. von Schlözer, p. 95, §2

Scheidemantel, on the other hand (I, pp 65sqq) regards war, along with contract, as a rightful way of founding a State, cf also Daries, §659, and Heincke, I, c. 2, §8

The contract as 'an idea of reason'

84 Cf Kant, *Works*, VI, pp 329, 334, 416sqq , VII, p 133. A similar theory already appears in Beemann, *Consp* p 13, and in Kreittmayr, §3. Thomasius also suggests (in *Fund* III, c 6, §§2–6) that

down previously, I 'tutio c: tatis ita subito et
io quasi continuo a ı facta fue

these line e has been much discussion—arising
fro the c ın, advanced by : veral writers, that the social contract
as for R oo [as well as for ant] only an 'idea' [I e only a logical
postulate, and not ε time]—with regard to the extent to
which the social con ract had been lready interpreted in a purely 'ideal'
sense before the day of Kant See, in this matter, the *Addendum* to p. 121
of the author's wo k on Althusiu (pp 347–50 of the 2nd and 3rd
editic s)

85 Cf supra, pp 47sqq , nn. 72–4 to §14, Pufendorf, *J n et g* VII, c 2, §§7 and 15, c 5, §6, and *De off hom et civ* II, c 6, §§7, 12, Thomasius, *Inst. jur. div* III, c 6, §64, Locke, II, c 8, §§97sqq , Rousseau, IV, c 2, Hoffbauer, p 240

86. The question is raised most vigorously by Fichte, *Works*, III, pp. 16, 164, 178sqq., 184sqq

Contract renewed by each generation

87. Pufendorf (*J n et g* VII, c 2, §20 and *De off hom et civ* II, c 6, §13) regards subjection as incumbent without any question on later generations, and it is only the subjection of fresh immigrants which he refers to a 'tacit pact' concluded at the time of their entry into the country The same view occurs in Hertius, *De modo const* s. I, §§7–8, and in Titius, loc cit

Locke, on the other hand, rejects the idea that descendants are bound by the act of their ancestors, and he assumes a free act of agreement with the State, at the time of coming of age, which is evidenced by remaining in the country (II, c 8, §§113–22) Similarly Rousseau writes (IV, c 2), *quand l'État est institué, le consentement est dans la résidence.* Cf. Hoffbauer, pp. 189 and 242sqq.

Freedom to renounce the contract

88. Pufendorf, Schmier, Locke, Rousseau and other writers, who expressly emphasise the right of individuals to keep aloof from contracts and to remain in the state of nature, none the less admit that when once accession has been expressly or tacitly declared, it is binding for life (supra, nn. 73, 77 and 78). Rousseau (III, c. 18) argues that it is only the sovereign community which can at any time annul the contract

Fichte, however, argues that not only can a civil society itself alter its constitution at any time in spite of any provision in the contract to the opposite effect (*Works*, VI, pp 103sqq), but each individual can also secede from the society at any time by virtue of his own free inalienable will, since it is the 'inalienable right of man to annul his contracts, even by unilateral act, as soon as he wills to do so' (pp. 115sqq and 159). In the same way a number of persons have the like right, and if they exercise it, their relations to the State are thenceforth only relations of natural law, so that they can conclude a new civic contract, and are thus able to erect a 'State within the

State' at will (ibid pp. 148sqq , the famous example of such a procedure given by Fichte is the 'European State' of the Jews, but 'partial' examples which he cites are the army, the nobility and the hierarchy)

Contract the basis of all associations

89. After Althusius had generalised the theory of a social contract [i e applied it to all forms of association], in a radical sense, and after Grotius had accepted this generalisation with some modifications, and Hobbes had incorporated it into his absolutist system (supra, § 15, pp. 62–92), the thinkers who succeeded them—Pufendorf, Thomasius, J. H. Boehmer, Wolff, Daries, Nettelbladt, Achenwall, Hoffbauer, etc —continued to follow this line of thought We must admit one exception Rousseau's conception of the political contract [as the one and only contract] leaves no room whatsoever for other forms of social contract [resulting in societies other than the State].

90. See below. [Gierke's reference is perhaps to the intended section, which was never written, on *die Korporationstheorie im Kirchenrecht* As his work stands, there is only a slight reference to the Church at the end of § 18, p 198]

The Family as based on contract

91 To meet the case of the Family, a category of 'necessary societies' was often added to the category of 'voluntary societies' in which the State and the Church were both included cf e g Daries, § 549, Nettelbladt, § 332, Achenwall, II, § 9 Many thinkers also included the *societas gentium* among the necessary societies which were not dependent for their origin on an act of will cf Thomasius, *Inst jur. div* III, c 1, §§ 4sqq , and Daries, § 549. But the difficulty of ascribing the origin of the Family-association, like that of other associations, to an act of contract, was often quietly evaded, and without further ado contract was declared to be the one and only source of all forms of social obligation—cf Hoffbauer, p. 187, C. von Schlozer, § 3, Fichte, *Works*, VI, pp 80sqq. Wolff takes this line (*Instit* § 836), but he prudently mentions quasi-contract in addition to contract proper

Theories of the Family

92. Thomasius (*Inst jur div.* III, c 1, §§ 4–10), Schmier (1, c 2, ss 1–3), Gundling (c. 3, §§ 49–55 and cc 26sqq), and other writers still continue to treat *societas paterna* and *societas nuptialis* as being both equally non-contractual societies, while they regard *societas herilis* [the 'society' of master and servant —the third of the three sub-groups which together constitute the Family] as derived from contract. But Gundling adds that the authority of the father and that of the husband are not true forms of *imperium*.

Locke (II, c 6, §§ 52–76) regards only paternal authority—which he holds, however, to be a matter of duty rather than of right—as belonging to the state of nature Rousseau (I, c 2) pronounces the Family to be the oldest and the only natural society, but he argues that it continues to be natural only until the children have come of age, and that after that time it depends, like other societies, purely on contract. Most of the writers on natural law specifically include marriage among the *societates voluntariae* cf e.g. Daries, § 549, Nettelbladt, § 333, Achenwall, II, §§ 42–52 This view is expressed most vigorously by W. von Humboldt (p 121), and he draws from it the conclusion that marriage should be freely dissoluble, the same conclusion appears in Hoffbauer, pp 209–12.

Theocratic views of the origin of the State

93 Such theocratical assumptions are to be found in Praschius, Placcius, H Cocceji and the earlier works of S. Cocceji, cf supra, n 47 They are also to be found in Filmer (who derives all authority from the paternal power

bestowed directly by God upon Adam), in Bossuet (I, art. 3, prop 4); and in Fénelon (c. v and conclus. 1). F. C v n Moser, in opposition to the 'dreams' of a social contract, also appeals to the idea of the divine origin of the State (*Neues patriot. Archiv*, vol. 1), for his view see A. L. von Schlözer, *Anhang*, pp 173sqq.

Horn's attack on the Social Contract

94. Horn attacks both the conceptions of contract. He attacks the conception of the contractual foundation of human society [the *Gesellschaftsvertrag*], on the ground that men had never lived in isolation and had never come together for the first time to make such a contract (I, c 4, §§3–6), and he attacks the conception of the derivation of political authority from an act of contractual devolution [the *Herrschaftsvertrag*]—whether such devolution be regarded as made by the community (II, c. 1, §§17–18), or by individuals (ibid. §19)—on the ground that there is no community distinct from the aggregation of individuals, and that individuals had never possessed a sovereignty to devolve. He declares not only the theories of Barclay, Salmasius and Grotius, but also that of Hobbes, to be revolutionary, and a danger to the State, since every *pactum* made by men can also be unmade. Just as he rejects the social contract as an explanation of the State's origin, so he rejects military force (ibid c. 13), natural evolution (§14), the *jus naturale et gentium* (§15), and *necessitas et indigentia* (§16)

His view of authority as given by God

95. Horn admits that the *civitas* is constituted 'by nature' alone, but he holds that the *respublica*, which presupposes 'majesty', *non natura constituitur* (I, c. 4, §§3–6) God Himself is the 'sole and unique and direct cause of majesty', by communicating a part of His own authority to the monarch and thus appointing him 'vicar of God' (II, c. 1, §§4–12). Conquest, election, hereditary succession, and even actual appointment and investiture, are only *modi consequendi*, and they are destitute of constitutive or creative power (ibid §§13–21) * In the same way the authority of the husband does not depend on any 'devolution' by the wife, *sed quamprimum nubit, maritus a Deo consequitur potestatem in uxorem* (ibid §19).

Yet he admits secular authority in Republics

96 Horn, III, c. un §§1–5. True, genuine 'majesty' never exists in a republic, because such majesty can only be the 'work of Almighty God'. The subjection of individuals in a republican State is limited to the extent of their consent there is no 'eminent domain', and capital punishment is properly speaking excluded But by 'pacts and conventions' formed in imitation of monarchy something like subjection is attained in a republic, *quoad efficaciam communis utilitatis* A substitute is ultimately found even for 'eminent domain', as a result of the *societas omnium bonorum* into which the citizens of a republic enter;† and capital punishment itself is made possible by treatment of the criminal as an enemy and by the assumption of a previous act of consent to its infliction

97 This revival of a philosophical theory of the natural origin of the State appears especially among political thinkers with an Aristotelian tend-

* I e. they are ways of acquiring an authority already existing, because already constituted by God, but they do not cause such authority to exist, or constitute it as such

† In a monarchy, the State's right of 'eminent domain', which enables it to expropriate land for a public purpose, is due to the fact that the King, as God's vicar, possesses God's final ownership In a republic, the State may still expropriate land, but its right depends on the fact that the citizens have formed themselves into a company and made that company the final owner of the land.

ency cf the author's work on Althusius, p 100 n 68, Boecler, I, c. 1, Knichen, I, c 1, th 2, c 8, th 2, Rachelius, I, tit. 12, §2 and titt. 14–31.

98. Particularly by Vico and Ferguson (n. 52 supra).

99 This is the case with Leibniz (supra, n 50) and Montesquieu (supra, n 51). Even Herder (op cit pp 210–22) does not eliminate contract altogether It is only the 'first class, that of natural governments', which, in his view, depends upon the natural order of the family the 'second class' is composed of communities based on 'contract or commission', and the 'third class' consists 'of hereditary governments over men', which arise from war and force, but are legalised by a 'tacit contract' *Even Herder uses the idea of Contract*

100. Such moderate opposition is to be found in Justi (supra, n. 82)

101. Hume (*Essays*, II, 6) argues that the duty of obedience to the State cannot be based on a foundation of contract, because the extinct promise of our ancestors no longer binds us to-day, and the assumption that all were born free, and only became members of the State by virtue of their own promise, is contradicted by experience As a matter of fact, every man feels himself obliged without further question, and his remaining in the country does not depend on his free choice, and cannot therefore be interpreted as an act of consent The real legal ground of the duty of obedience is the fact that we feel it to be a duty to obey, when once our primitive instincts of disobedience and ambition have been modified by a growing recognition that it is impossible for society to endure without obedience (pp. 269–303). *Hume on the Social Contract*

But Hume regards the making of an original contract, with a provision for resistance, as an actual fact True we possess no documents to attest the fact, because the contract was made in the woods, before the discovery of writing, and it was not written on parchment or the bark of trees But we may read it in the nature of man, since the surrender of our natural liberty in favour of our fellows could only come about by voluntary choice, and the beginnings of a government could not arise in the absence of consent (pp 266–9) Cf also *Essays*, II, 2.

102 This conception of the purpose of the State appears most definitely in Hobbes and the absolutists who adopted his views, cf supra, nn 74 and 78. It also appears in Rousseau, who (I, c 6) regards the fundamental problem as being 'to find a form of association *qui défende et protège de toute la force commune la personne et les biens de chaque associé*, without abolishing the liberty and equality of all'. see the author's work on Althusius, p 345, n. 47, and see also p 113 infra *Rousseau's view of the purpose of the State*

103 This proposition [that the purpose of the State determines the extent of its authority] was never contested by the absolutists, it is the basis of the deductions of Spinoza (*Tract theol -pol* cc 16–17 and 20), and it is employed by Rousseau (I, c 6, II, c 4) It is expressly formulated by a number of writers—e.g Hertius, *De modo const* s. 1, §6 (the citizens are not absolutely bound, either to one another or to the Ruler, but only *quatenus ad finem societatis obtinendum expedit*, since it is not to be supposed that any further obligation has been intended), J. H Boehmer, *P spec* I, c 5, §§ 20–30, Wolff, *Instit* §980, *Jus. nat* VIII, §§35, 37, *Pol* §215, Locke, II, c. 9, §131, Achenwall, II, §§10, 98, Darics, §§26 and 780–9 (in all States, certain 'natural limits' on political authority flow from the *scopus civitatis* these are the only limits which exist in a *civitas necessaria*, but *limites pactiti* may also exist in addition in a *civitas voluntaria*), Beccaria, §2, Kreittmayr, §§1–2, Scheidemantel, III, pp 330sqq. *The power of the State limited by its end*

Even the absolutists admit limits on the State

104. Cf *Leviathan*, c. 21, on the matters which in their nature are not subject to the authority of the State, see also cc. 17–19, 21, 24, 26 and *De cive*, cc 5–7, 14. Mevius (*Prodromus*, VI, §§1 sqq) is like Hobbes in holding that men have submitted everything to the State—including even the rights which they hold by nature—and that no man, therefore, can invoke the law of nature against the State. But he recognises that the dictates of *jus naturale* and *jus divinum* in regard to the rights of the individual are objective limits on the exercise of authority by the State. A similar view, though it rests on a different basis, is to be found in Horn, II, c 2, §10 and c 12, §§2–13, Bossuet, VI, a 2 and VIII, a 2, Fénelon, c XI

Spinoza on the State's limits

105. Spinoza regards each individual as having transferred all his power, and thereby *omne jus suum*, to the community, which thus possesses absolute power over all men *Tract. theol -pol* c 16, *Tract pol* cc 3–4. But the authority of the State is limited, none the less, by the natural law of its own power. It cannot really issue *any* command, nor can the subject really transfer *everything*, inasmuch as he necessarily remains a man, and therefore a being who is spiritually and morally free More especially, the individual reserves for himself the power of thinking what he likes, and of expressing his opinions orally and in writing But where the power of the State ends, its right also ends, and reason, which always considers its own interest, impels the State accordingly to limit itself, in order that it may not suffer the loss of its power, and thus of its right, through resistance In this way the State attains a recognition of the 'dictate of reason'—that its true object is not domination, but liberty cf *Tract theol -pol* cc. 16–17 and 20, *Tract pol* c 3, §§5–9, c. 4, §4, c 5, §§1–7 [It would thus seem to follow that Spinoza is not, after all, one of the 'absolutists', as has been suggested previously.]

The reader is referred, for an account of the views recently expressed by Menzel [*Wandlungen in der Staatslehre Spinoza's*, Stuttgart, 1898], which to some extent diverge from those stated here, to the Addenda to the author's work on Althusius [2nd edition], pp 342sqq , nn 39–41, and p 346 n. 49, and also to the Addenda to the 3rd edition, nn. 54–7. [The English reader may be also referred to Duff, *The Moral and Political Ideas of Spinoza*]

106. *Contr soc* I, c 6 (*l'aliénation totale de chaque associé avec tous droits à toute la communauté*), cf also c 7

Rousseau on the rights of man

107 Ibid II, c 7. Although there can be no legal limits upon the sovereign power of the social body over its members, there are inherent limits arising from the very nature of the general will, of which all individual wills are part, and which can only will what is equal and just for all Absolute as the sovereign may be, it can never really burden one subject more heavily than another, *parce qu'alors l'affaire devenant particulière son pouvoir n'est plus compétent*, and thus the individual, in the last resort, has not made any real alienation, but rather an advantageous exchange, receiving back for what he has given a greater security of his liberty, his equality and his life This is not logic, and it is in vain that Rousseau tries to shelter himself, in a footnote, from a charge of illogicality The reader is referred, for an account of the vigorous controversy which has arisen recently in regard to Rousseau's attitude to the theory of the rights of man, to the Addenda to the author's work on Althusius [2nd edition], p. 347 n. 50, and to the Addenda to the 3rd edition, n 63

108 Sieyès expressly says that societies only exist for the sake of individuals, and that the happiness of individuals is the only object of the social

state *Works*, II, p 32, I, pp 417, 431. But the purpose of the State is also (if only implicitly) made to consist in the happiness of individuals, when it is defined by Hertius (s. I, § 1) as *tranquilla et beata vita*, or by Wachter (p 34) as *mutua et communis felicitas*, or by Wolff (*Instit.* § 972 and *Jus nat* VIII, § 14) as *sufficientia vitae, tranquillitas et securitas* *Salus publica as consisting in the happiness of individuals*

There is less of an individualistic tinge in the formula of Justi (*Natur und Wesen*, §§ 30–44) He makes 'the common happiness of the whole State' the object of commonwealths and their sovereign law (though he adds that, sovereign as it may be, it can never warrant any action that is unjust in itself) he regards liberty, security and internal strength as the main elements of this happiness, but otherwise he leaves each people free to determine the particular objects of its own life But even Justi adds that the 'common happiness' consists pre-eminently in the happiness of the subjects, and secondarily ' of the Ruler

A L von Schlozer (pp 17ff) distinguishes between (1) the *finis negativus* of the State, which is limited to securing and protecting, as against fellow-citizens, aliens and natural causes, the four kinds of property (in a man's person, his possessions, his honour and his religion), and (2) the *fines positivi*, which come to be added with the development of civilisation, and are directed to the advancement of prosperity, population and enlightenment (cf p 93, § 1)

109 The purpose of the State is defined by Kestner (c. 7, § 4 and §§ 17sqq) as *justitia colenda*, by S de Cocceji (*Nov. syst* §§ 280 and 613), as *defensio jurium singulorum*, by Heineccius (§ 107), as *securitas civium*, by Daries (*Praecogn* § 24 and *P spec* §§ 656 and 664–6), as *securitas*, by Hoffbauer (pp 236sqq.), as legal security, by Scheidemantel (I, p 70), as 'the attainment of internal and external security by means of united resources', by Klein (II, pp. 55sqq), as 'protection of social life' In Filangieri (I, cc 1–12) the purpose is *conservazione e tranquillità* in Mercier de la Rivière, Turgot and the other Physiocrats, it is *liberté et sûreté* of person and property in Hume (*Essays*, II, no 3) it is simply justice, and King, Parliament, ministers and the rest—including even the clergy—properly exist only in order to support the twelve jurymen. *Definitions of the State's purpose*

110. Locke (II, c 9, §§ 123–31), following this idea of 'insurance', denies any other purpose to the State than that of guaranteeing natural rights, particularly the rights of 'liberty and property'. *The State as an insurance society*

In the theory of W von Humboldt the final object of human existence is the development of personality (pp 9sqq) The State is only a means for attaining that security of its citizens, and thereby that 'consciousness of legal freedom', which are the indispensable conditions of such development (pp 16sqq) Security has to be attained both in regard to enemies without (pp 47sqq.) and between the citizens themselves (pp. 53sqq.), and therefore the legitimate activities of the State are confined entirely to (1) the enacting of administrative, civil and criminal law, (2) jurisdiction, (3) the care of minors and lunatics, and (4) the provision of the means necessary for maintaining the structure of the State (pp 100–77) Conversely, the making of any provision for the common good (pp 44sqq), and any attempt to influence education, religion or moral improvement (pp. 61sqq), are injurious

Kant goes furthest of all in the limitations which he assigns to the purposes of the State. It is confined to realising the idea of Right or law (*Works*, VI, p. 322 and VII, p. 130), and that realisation must be attained without

reference to the consequences of good or bad which follow [i e the idea of impersonal Right must be carried into effect regardless of its effect on the Good of persons], cf VI, pp 338, 446, VII, p 150 Kant expressly attacks the idea of the 'welfare-State'—i e. the State directed to the well-being of its members—unless such well-being or happiness be understood only to mean a condition in which the constitution is in the greatest possible harmony with the principles of Right, or unless, again, a law which [immediately] aims at some form of happiness (e g opulence) is only intended to serve [ultimately] as a means of securing a system of Right, especially against external enemies, cf VI, pp 330sqq., VII, p. 136.

111 Cf e.g. Locke, II, c 9, §131 and c 11, §§134sqq., Wolff, *Instit.* §74, Sieyès, I, p. 417, II, pp 3sqq. and 374sqq., Kant, VI, p 417, VII, p. 34.

Natural as opposed to civil rights

112 This theory [of a distinction between 'civil' and 'natural' rights] is already implied in advance by all the doctrines in which, from the Middle Ages onwards, the law of nature is exalted above the State, and it plays an important part in the thought of e g Althusius and Grotius. But it was only during the reaction against Hobbes' attempt to annihilate the idea of the natural rights of man that it was formulated as an explicit theory. Huber was particularly responsible for the development of a formal theory of the rights (of person, property, liberty of thought and freedom to follow the divine commands) which must be reserved in all forms of State for the individual, by means of the necessary articles in the contract [of government], and are thus removed from the control of the sovereign cf. *De civ* I, 2, cc. 3–5 and I, 3, c 4. Pufendorf also reserves for the individual, as a man and as a citizen, natural rights which, though they are imperfectly protected as against the sovereign, are still indestructible. *Elem.* I, d 12, §6, *J. n et g.* I, c 1, cc. 8–9, *De off hom. et civ* II, c 5, c 9, §4, c 11. Hertius argues in the same sense, *De modo const* s. 1, §6, and Schmier devotes a detailed exposition to the theory, III, c 3 and V, c. 2, s. 1.

Thomasius on liberty of conscience

113. Cf Thomasius, *Instit. jur div* I, c 1, §§114sqq and *Fund* I, c 5, §11sqq, where a clear distinction is first drawn [before he comes to the particular question of liberty of conscience] (1) between *jus connatum* and *jus acquisitum*, and (2) between the 'subjective' side of any body of law [law or 'Right' as expressed in the rights of 'Subjects' or persons] and its objective side [law or 'right' as expressed externally in a concrete body of rules] See also J. H. Boehmer, *P. spec.* I, c. 5 and III, cc 1–2, and Gundling, c 1, §§51–62.

114 Locke, II, c 11; cf also Sidney, I, ss 10 and 11 and II, ss. 4 and 20. The same view appears in the French physiocrats

Wolff on natural rights

115 The main object of Wolff's enquiries into the extent to which the original law of nature is either over-ridden by the contracts which form the State, or still continues to preserve its validity, is simply to attain a basis for dividing the rights and duties of political man into those which are acquired and those which are innate. The conclusion which he attains is that the individual retains the sovereignty he enjoyed in the state of nature, in regard to all actions which the political authority is not warranted by its purpose in regulating, but he also vindicates the inviolability of those 'acquired' rights which are so much bound up with man's being that he cannot be deprived of them. *Instit* §§68sqq., 980, *Jus nat.* I, §§26sqq. and VIII, §§35 and 47, *Pol.* §§215 and 433.

116. Cf. e g. Danes, *P spec.* §§710–46 (*jura naturalia absoluta*), Nettelbladt, §§143sqq., 193sqq, 1127, 1134–42 (there are *obligationes connatae* as well as *contractae*, and *jura connata* as well as *quaesita*), Achenwall, I, §§63–86, II, §§11 and 98–108, Kreittmayr, §§32sqq, Scheidemantel, III, pp 172–343. See also Turgot, art. *Fondation*, §6, p 75 *les citoyens ont des droits et des devoirs sacrés pour le corps même de la société* Compare also Blackstone, *Comm* I, c 1, pp 124sqq. [where Blackstone distinguishes 'absolute' rights from those which are 'social and relative'] *Vogue of theory of natural rights*

Montesquieu, it is true, assigns to the State the object of realising as far as possible the spiritual and economic liberty of the individual (cf e g XII, cc 1–18, XIII, cc 12 and 14, XX, c 8, XXIII, XXV, cc 9–13), but in attacking slavery he merely uses the idea of the inalienability of liberty (XV, cc 1–18) [In other words, he speaks of liberty as achieved by the State, but at the same time regards it as independent of the State.]

Justi also (§18) pronounces that government to be the best which limits 'natural liberty' as little as possible and yet succeeds in achieving the purpose of the State

117. This is especially true of Sieyès, whose *Reconnaissance et exposition des droits de l'homme et citoyen*, of July 1789 (I, pp 427sqq), forms the basis of the public Declaration of the Rights of Man (I, pp 413sqq). Along with freedom, which the citizens bring with them as their inalienable right into the social state (II, pp 3sqq), he makes property, 'that God of all legislation' (II, p 35), inviolable by the State cf also II, pp 374sqq * In the present context, in which we are only concerned with the theoretical [and not with the historical] development, we need not reckon with the fact, on which Jellinek has remarked, that the American 'bills of rights' [e g the Virginia Bill of Rights, and the Pennsylvania 'Declaration of the Rights of the Inhabitants of the Commonwealth or State', of June and September, 1776] were anterior to the French Revolution of 1789 as constitutional assertions of the fundamental rights of individuals Droits de l' homme *in* 1789

In Kant also the innate and inalienable rights of the individual—in the three senses of the liberty of man, the equality of subjects and the independence of the citizen—form the limits and the canon of all political life· *Works*, VI, pp 322sqq and 416sqq and VII, pp 34sqq, 147sqq A similar view is to be found in A L von Schlözer, pp 51sqq Hoffbauer goes to the furthest length. He begins by developing a system of the absolute (or original), and the conditional (or acquired) rights, which belong to all rational existence (pp 64sqq.), he then proceeds to depict the absolute or original rights of man (pp. 111sqq), only after that does he arrive at man's conditional or acquired rights (pp 120sqq). But even now he has first to discuss the 'universal', and then the 'particular', species of such rights, and afterwards, under the latter head, to treat of an 'extra-social' form, before he finally arrives at the 'social' form of the 'particular' species of 'conditional' rights [cf n 19 supra for this process of subdivision *in excelsis*]

Möser attacks the conception of the rights of man (*Misc Writings*, I, pp. 306, 313, 335) but he definitely recognises in an earlier work (*Patriot. Phantas.* III, no 62) the existence of free rights of the individual which are not forfeited in the social state.

* Reference may also be made to T. Paine's *Rights of Man*, Part I (of January, 1791).

The variations of Fichte's views

118. In this connection [i e as regards the passing of individualism into a system of social absolutism, and vice versa] the variations of opinion which Fichte could achieve without abandoning his theoretical basis are particularly significant In 1793 he regards the purpose of the State as consisting only in 'the cultivation of liberty' (*Works*, vi, p 101), in 1796, in speaking of 'the purpose of Right or law', he is already willing to think of an economic transformation of the State in conformity with the idea of Right, and in 1800 (iii, pp 387sqq) he even derives his socialistic State, directed to the general welfare, from this idea [Gierke here is referring to Fichte's *Der geschlossene Handelsstaat*, on which see W Wallace, *Lectures and Essays*, pp 427sqq] By 1804 he is expanding the purpose of the State into 'the purpose of the human race', which leads him to interpret it as being the promotion of general culture (vii, pp 144sqq), and in 1807 he depicts the ideal of an educational State (vii, pp 428sqq.) Later still, he attempts to reconcile this later purpose of education and moral development with the earlier purpose of 'the cultivation of liberty' (*Works*, iv, pp 367sqq , *Posthumous Works*, ii, pp 539–42)

Corresponding to the variations in his view of the State's function are the changes in his conception of the relation of the individual to society At first he emphasises the inalienable rights of man which cannot be diminished by any form of contract (*Works*, vi, pp 159–61) In his *Naturrecht* (1796–7) he argues vigorously, in opposition to Rousseau, that the individual is only merged into the organised whole in one part of his being and nature, but otherwise remains 'a completely free person, who is not woven into the whole of the body politic '(*Works*, iii, pp 204–6), and even in *Der geschlossene Handelsstaat* of 1800 he still maintains this point of view (iii, pp 387sqq) In his *Grundzugen des gegenwartigen Zeitalters* (1804–5) he entirely alters his view the individual is now completely merged in the perfect State which ought to be the goal of endeavour He has nothing *per se* he has everything in virtue of being a member of the State, he is entirely the instrument of the State, and he is only sovereign 'in regard to his necessary purpose as a member of the race' [i e he is only sovereign in so far as he is part of a general humanity which is itself sovereign in determining the purposes of its life], cf vii, pp. 147sqq , 153, 157sqq , 210 He takes the same line in the *Reden an die deutsche Nation* (1807–8), but later still he adopts more of a *via media*, emphasising the 'moral liberty of the will' which is still left to the 'instrument' of which he had previously spoken (ii, pp 537sqq)

119 [Not only is individualism no bulwark against socialism and communism] on the contrary, it rather appears as if the elevation of the individual into the *terminus a quo* and the *terminus ad quem* of social institutions were an inseparable element of socialistic and communistic systems.

Recognitions of the social whole in eighteenth-century thought

120 Leibniz approaches nearest to this way of thinking, in the introduction to his *Cod jur gent dipl* i, §§11–13. There are also statements in Ferguson (i, cc. 7–10) which make the social aim consist, not in the greatest possible amount of pleasure, but in the greatest possible amount of spiritual activity, and therefore in the free development of the powers both of the national community and of individuals cf also v, c. 3 Scheidemantel too rises to the view (i, pp 75sqq) that there are certain natural basic rules for the attainment of the aim of the State, of which the greatest is that the well-being of the whole and the private well-being of the parts are to be simultaneously and jointly pursued by every individual and every society,

but that, where there is any clash, the well-being of the whole must be preferred

121. Horn accordingly makes a definite attack on theories of the original sovereignty of the people (II, c 1, § 18), of the existence of a 'real majesty' [as distinct from 'personal'] (II, c 10, §§ 11–15), and of the possibility of a *subjectum commune* of majesty (II, c 11, § 1) But he equally impugns the possibility of the popular community possessing *any* right whatsoever as against the Ruler (II, c 5, § 1)

Horn's attack on any form of plural sovereignty

122 Horn attempts to prove (III, c un § 2) that it is impossible for *plures conjunctim* to be the 'Subject' of majesty When rule is ascribed to all *ut universi* in a democracy, it is *ipso facto* also attributed at the same time to all *ut singuli*, and the result is that, since *imperium et obsequium non inhabitant unam personam*, the existence of any 'Subject' at all is really denied If, on the other hand, it be admitted that *singuli* are simply *subditi*, it follows that no other quality than that of being a body of *subditi* can be predicated of *singuli conjunctim*, i e of all when they are regarded as united in a *universitas* * Moreover [apart from the logical difficulty] there is a further difficulty, which is involved in the recognition of the majority-principle That recognition means either that *universi* are deposed [in favour of a mere majority] or that the rulers are, in part [i e as regards the minority], turned into being the ruled, but in any case a sovereign which changes with each vote would be a curious sort of sovereign If we now turn from democracy to aristocracy, we find once more that there is no 'Subject' or owner of majesty Here again, just as in democracy, a distinction has to be made between *universi* and *singuli*, though the two things thus distinguished are really one and indistinguishable. For if *singuli* have nothing, *universi* equally have nothing, and if *universi* have authority, *singuli* equally have a part of that authority, and the result [on the latter supposition] is that each member of the ruling class will have a *particula majestatis* which, like the whole of which it is a part, will be *summa*, and thus a number of *summa imperia* will arise Horn then argues, in § 3, that it is no less impossible for *omnes* or *plures* to possess 'majesty' severally (*divisim*) than it is for them to possess it jointly (*conjunctim*)

123 Cf III, c un , and supra, n 96 to this section

Critics of Horn's views

124 Pufendorf (*J n et g* VII, c 5, § 5) delivers a vigorous attack on the 'sophistical' arguments of Horn, objecting to him that, at any rate *in moralibus*, the whole can possess attributes which no part possesses, and arguing accordingly that, *in corporibus moralibus compositis, aliquid tribui potest universis quod neque omnibus* (i e *singulis divisim sumtis*) *neque uni alicui ex illis singulis queat tribui, adeoque universitas revera est persona moralis a singulis distincta, cui peculiaris voluntas, actiones et jura tribui queant, quae in singulis non cadunt* Compare also Schmier (I, c 3, nos 62–72), who seeks to prove, in opposition to Horn, both the philosophical and the legal justification of the distinction between a *totum compositum* and its *partes separatim acceptae*

The Ruler as representing the Group

125 Spinoza agrees entirely with Hobbes in thinking that a social body controlled by a single mind (*ut omnium mentes et corpora unam quasi mentem unumque corpus componant*) can come into existence through the vesting of all power in the Ruler, in virtue of a transference of their power by all individuals, so that the Ruler, *qua Civitas*, henceforth represents the will of every individual *Civitatis voluntas pro omnium voluntate habenda est id quod*

* Cf the argument of Hobbes, supra n 155 to § 14.

Civitas justum et bonum esse decernit, tanquam ab unoquoque decretum esse censendum est cf *Eth.* IV, prop 18 schol., *Tract pol* c 2, §15, c 3, §§1–5, c 4, §§1–2

Mevius (*Prodromus*, v, §§23–6) similarly holds that the *unio*, by virtue of which the State is *una velut persona* (*cui una mens, unus sensus, una voluntas, et anima inter multas velut una atque eadem*), is based on the submission of all wills to that of the Ruler, whence it follows that *imperantes totam multitudinem repraesentant et ejus vice sunt*—their action counting as the action of the 'whole community and of all severally', and the 'will and judgment of the Rulers being the will and judgment of the whole society or State' See also Houtuynus, *Pol gen* §99, no 14, Micraelius, I, c 10, §§14–17, Bossuet, I, a 3, prop. 1–6, VI, a 1, prop 2–3

126 Cf *Tract theol-pol* c 16 (*coetus universus hominum, qui collegialiter summum jus ad omnia, quae potest, habet*), *Tract pol* cc 3, 6 (*ut jus, quod unusquisque ex natura habet, collective haberent*), *Eth* IV, prop. 18 schol.

127 E g the one conclusion that emerges in Bossuet (v, a 1) is nothing more than the dictum, so often quoted since, that the monarch is *l'État même*

128 Huber, *De jure civ* I, 3, c 4, §§8–83, II, 3, c 1, §35 see also, on the validity of the majority-principle, which is referred to an original act of agreement, I, 2, c 3, §§27sqq , II, 3, c 1, §§21–2 and c 2, §§3–4

129 Ibid I, 3, c 2, §14, c 6, §26, I, 9, c 5, §§51 and 65–72, II, 3, c.6, §2

130 Ibid II, 3, c 6, §§1–10

Pufendorf on corpora moralia *as created by consent*

131 Cf *Elem* I, def 4, §13, *J n et g* I, c 1, §13 *persona moralis composita constituatur, quando plura individua humana ita inter se uniuntur, ut quae vi istius unionis volunt aut agunt pro una voluntate unaque actione, non pro pluribus censeantur* Therefore, he argues, not only is a *pactum unionis* necessary in order to produce, first of all, the State (*J n et g* VII, c 2, §6), a similar *pactum singulorum cum singulis*, to the effect that certain things shall be managed jointly and in the interest of *una persona moralis*, is also indispensable for families, corporations and local groups (*Elem* II, d 12, §26) In another passage, where he distinguishes between *corpora naturalia, artificialia* and *moralia*, Pufendorf repeats his view that a *corpus morale*, which remains identical in spite of all the changes of its parts, may be produced by a simple *conjunctio hominum* (*J n et g* VIII, c 12, §7) [In other words, a moral body may already exist in virtue of *conjunctio*, before any further step has been taken, such as the appointment of a representative organ to act on its behalf]

Pufendorf on the conditions of real Group-personality

132 Cf *Elem* I, d 4, §3, *J n et g* I, c 1, §13 *Idque tunc fieri intelligitur, quando singuli voluntatem suam voluntati unius hominis aut concilii ita subjiciunt, ut pro omnium voluntate et actione velint agnoscere et ab aliis haberi, quicquid iste decreverit aut gesserit circa illa, quae ad unionis ejus naturam ut talem spectant et finem ejusdem congruunt, unde est, quod cum alias, ubi plures quid voluerint aut egerint, tot voluntates et actiones extare intelliguntur, quot numero personae physicae seu individua humana ibi numerantur, in personam tamen compositam coalitis una voluntas tribuatur, et quae ab illis ut talibus proficiscitur actio, una censeatur, utut plura individua physica ad eandem concurrerint* He adds that under these conditions [i e where there is a moral body acting corporately through a representative] corporate property comes into existence, which does not belong to *singuli*, and other similar developments follow. See also *J n et g* VII, c 2, §5, *De off hom et civ* II, c 6, §§5–6 *unici multorum hominum voluntates nulla alia ratione possunt, quam si unusquisque suam voluntatem voluntati unius hominis aut unius concilii subjiciat, ita ut deinceps pro voluntate omnium et singulorum sit habendum, quicquid de rebus ad securitatem communem necessariis ille voluerit* Pufendorf argues, on this basis,

that a Group-person never arises from a simple contract of union, it must always be called into being by a number of contracts (*necessarium est, ut voluntates viresque suas univerint intervenientibus pactis*), which find their culmination in the contract of subjection, cf *J n et g* VII, c 2, §6. It follows that a *Systema Civitatum* [i e a confederation], being a *nuda conventio*, and not having erected any *imperium*, is not a 'person' [since there is no man, or body of men, with authority to represent it], and cannot act by majority-decision cf *J. n et g* VII, c 5, §20

[In brief, the argument is that while simple *conjunctio* can produce a 'moral body' (see the end of the preceding note), and while such *conjunctio* may thus be the first step in constituting a 'moral person', there is something more needed before a real 'moral person' can emerge That something more is the creation of a representative organ, and submission thereto, for only in the 'person' of the representative organ can the 'person' of the *corpus morale* really exist and function.]

133 The doctrine of *entia moralia* already occurs, in essence, in *Elem* I, d 1sqq [of the year 1660], but it is developed further in *J n et g* I, cc 1–2 [of the year 1672]

Pufendorf's theory of entia moralia

134 *J n et g.* I, c 1, §3 They are mere *modi*, which do not come into existence, like *entia physica*, through 'creation', but through 'imposition' i e they are 'superadded' to something already in existence They have no power of producing physical changes, and the only effect they produce is on the mind, by making men understand better the nature of their actions (§4) Just as they only come into existence by 'imposition', so they may be changed, or even abolished, by some alteration of such 'imposition' (whether by God or men), but the sort of change to which they are thus subject is one by which *ipsa personarum aut rerum substantia physica* is not affected (§23).

Some are substances some only attributes

135 Ibid §§5–6 Pufendorf prefers the twofold classification of 'moral entities' under these categories [of substance and attribute] to the single classification which we should have to adopt if we confined ourselves to the idea that all *entia moralia*, being *modi*, are attributes of *homines*, *actiones* or *res*

Moral persons like substances

136. Pufendorf begins by arguing that in the moral world *status*, as the basis of the existence of 'moral persons', corresponds to what *spatium* is in the physical world as the basis of the existence of physical persons in place and time * He admits some difference *spatium* can continue to exist after the disappearance of all natural objects, but *status* is inconceivable after the disappearance of the persons who exist in that medium (loc cit §§6–10)

Having drawn this analogy [between the basis of existence of moral and that of physical persons], Pufendorf proceeds to interpret 'moral persons' themselves in the light of the analogy of physical substances (§§12–15) [But while he thus interprets *persons* as being moral in a way analogous to that in which substances are physical], he thinks it unnecessary ever to interpret *objects* (*res*) as being 'moral' in this sort of way, since the attributes of objects (e g that they are 'sacred') can be referred on a deeper analysis to an *obligatio hominum* (§16) † Other *entia moralia* [i e moral entities other than

* Pufendorf's *spatium* is 'time-space' it is both temporal and spatial extent

† We need not regard a thing, such as a sanctuary, as being an *ens morale*, on the ground that it has the attribute of being sacred, and that there must be an *ens* as the substance which carries that attribute Really, the attribute of being sacred can be reduced, if we turn from the thing to the men behind the thing, to an obligation of men to regard the thing as sacred

personae] are not *ad analogiam substantiarum concepta* they are simply *modi*, or attributes, of a purely 'formal' character (§17) They exist, that is to say, either as 'qualities' (e g. a 'title', or a 'power', or a 'right', or an 'obligation', are all qualities, §§18–21), or as 'quantities' (e g 'price', or 'credit', or the value of a business, are all quantities, §22)

Moral persons simple or compound

187. Loc. cit §12: *Entia moralia, quae ad analogiam substantiarum concipiuntur, dicuntur personae morales, quae sunt homines singuli aut per vinculum morale in unum systema connexi, considerati cum statu suo aut munere, in quo in vita communi versantur Sunt autem personae morales vel simplices vel compositae.*

Simple moral persons

188. Loc cit §12 The *persona moralis simplex* is therefore either *publica* (whether such 'person' be *principalis*, or *minus principalis*, or *repraesentativa*), or *privata* (according to profession, civic status, family standing, descent, sex and age) The *ens morale* can never be a *qualitas physica* if a plebeian becomes a noble, or vice versa, no physical change is involved, and the Catholic doctrine of an 'indelible moral character' is therefore absurd (§23) [See n 134 supra, on the 'imposition', and the consequent possibility of removal, of the *modus*—the attribute or character—which constitutes 'moral being'. It follows, on this argument, that 'imposition' makes the 'character', or *ens morale*, of a priest, and what has been 'imposed' can be removed Holy orders, therefore, are not 'an indelible moral character', to argue in that sense is to treat such orders as a 'physical quality' which cannot be altered]

189 Loc cit §14 (the individual may 'bear' a number of 'persons' because he has a number of 'positions' (*status*) which do not conflict)

140 Loc. cit §13 cf supra, n 132

141 Loc cit §15 here we see that the *impositio* of an *ens morale* is not independent of every quality of the object Caligula could make a fool into a senator, but not his horse

Pufendorf also rejects the personification of inanimate objects which Hobbes achieves in c 16 of the *Leviathan* [e g of a bridge on which there is a right of charging tolls] as an unnecessary fiction—*cum simplicissime dicatur, a civitate certis hominibus injunctam curam colligendi reditus istis rebus servandis destinatos, et quae eo nomine oriuntur actiones persequendi aut excipiendi*

Nature of compound moral persons

142 Cf *Elem.* I, d. 4, §3, *J n et g* I, c 1, §13, VII, c 2, §6 It follows that *personae morales compositae* are not able *seipsas qua tales obligare*, any more than single persons are able to do so Their decisions only bind *membra societatis qua singula, nequaquam autem societatem ipsam qua talem* The contract for the foundation [of the society, as a 'compound moral person'] is not a case to the contrary the society does not 'oblige itself' in any way even by that act, all that happens is that 'the members severally, as such, bind one another mutually, to the effect that they are willing to coalesce in a single body' If an individual afterwards gives a vote, he too does not oblige himself directly thereby, it is only indirectly that he does so—i e in so far as he helps [by that vote] to form the will which under the *pactum fundamentale* is binding upon him. Cf. *Elem* I, d 12, §17

148 Pufendorf himself often uses the expression *persona physica* instead of *persona moralis simplex* cf *J n et g* I, c 1, §13, VII, c 2, §6 and c 5, §8

Such persons not natural, but created by agreement

144 Pufendorf expressly urges that 'naturally' a *confusio omnium voluntatum in unam* is impossible, and that a common will can only arise [by something more than a natural process, i e] by a *moralis translatio voluntatum*, whereby *illud quisque velle censetur, quod in alium contulit, [aeque ac] si ipse velit.* In the same way the union of the powers of individuals [as distinct from their

wills] does not come to pass naturally, but as a result of promises of obedience and the giving of guarantees for the fulfilment of those promises cf *J n. et g* VII, c. 2, §5 and *De off hom et civ* II, c 6, §§5–6, and see also, as regards the impossibility of *unio naturalis* and the nature of *unio moralis*, Otto's commentary on the latter passage Pufendorf accordingly goes so far as to commend the comparison drawn by Hobbes between the State and an 'artificial man', *J n. et g* loc cit §13 and *De off hom et civ* loc. cit §10

145 *Elem* I, d. 12, §27, *J n et g* VII, c 2, §§15–19 and c 5, §6, *De off hom et civ* II, c 6, §12 Such an agreement [establishing the validity of majority-majority-decisions] is always to be presumed, in Pufendorf's view, because there is no better way than majority-decision of arriving at a united expression of will by an assembly He admits that any individual, on entering a society, may reserve for himself a right of giving or withholding his assent [to a majority-decision] on any issue, but he argues that, even in that event, the mere *pertinacia* of such an individual does not affect the decision of the assembly adversely, for though the decision will not be binding upon him *ex suo consensu*, it will still be binding *ex generali lege ut caeteris sese commodum praebeat et ut pars se conformet ad bonum totius* *Even their majority-decisions depend on a previous agreement*

146 *J n et g* VII, c 2, §§13–14, *De off hom et civ* II, c 6, §§10–11 The commentators—Titius, Otto, Trauer and Hertius—expressly censure Pufendorf for taking over from Hobbes, in these passages, the identification of the *Imperans* with the *Civitas* cf also Titius, *Observ* 557

147 Pufendorf accordingly describes the sovereign *Concilium* in a republic as a *persona moralis composita* or *conjuncta* *Elem* I, d 12, §27, *J n et g* VII, c 2, §15, c 5, §5, *De off hom et civ* II, c 8, §4

148. Hert, for example, emphasises the fact that what is 'physically' impossible is sometimes 'morally' possible, and what is monstrous *in physicis* may be unexceptionable *in moralibus* e g on a *consideratio physica* a plurality of men cannot be one, nor one man a plurality, but on a *consideratio moralis* a number of men may be taken together as a single person, or one man may be taken to be several persons In the realm of nature a single head with a number of bodies, or a single body with a number of heads, is a *monstrum*, but this is by no means true of moral bodies Cf *Annot ad Pufend J n et g* I, c 1, §3 n 4 and *Opusc* I, 3, pp 27sqq and II, 3, pp 41sqq *Hert modifies Pufendorf*

149 Thomasius defines a *persona* as *homo consideratus cum suo statu* He distinguishes between the *persona simplex, sc unicum individuum humanum*, and the *persona composita ex pluribus individuis certo statu unitis* (*Instit jur div* I, c 1, §§86–7), and he defines the State as a *persona moralis composita* (ibid III, c 6, §§62–3) Titius regards jurisprudence as almost exclusively concerned with *personae morales*, which are either *singulares* or *compositae* (*Observ* 94, *Jus priv. Rom -Germ* VIII, c 2) Cf also Ickstatt (*Opusc* II, op I, c 1, §§14–15), who regards *persona moralis simplex* and *persona moralis composita* as distinct, exactly like Pufendorf *Thomasius retains his theory*

150 Hert, *Opusc* I, 1, pp. 286 and 288, II, 3, pp 41 and 55, Gundling, *Jus nat* c. 35, §34, c 37, §§3–10, and *Exerc* 16, §5 (*personae mysticae vulgo audiunt, ac morales compositaeque dicuntur*), Schmier, I, c 3, nos 62–72, and also Becmann, c. 12, §7

151 Nettelbladt (*Syst nat* §83) can still remark incidentally that 'physical persons' are also called 'single' (*singulares*), and 'moral persons' also go by the name of 'composite' or 'mystical', but he himself only uses the expression 'moral persons' Cf also Scheidemantel, III, p 244.

152 Cf e g J H Boehmer, *P spec* I, c 2, § 1, c 3, § 1 n *o*, Heineccius, *Elem.* II, § 20, Achenwall, *Proleg* §§ 92–3, II, §§ 3 and 15, Hoffbauer, pp. 190, 244, 292, 310

Leibniz adopts the terms *persona naturalis* and *persona civilis* in his terminology, but he also uses the adjectives *moralis* or *ficta* as synonymous with *civilis* *Nova meth* II, § 16, Introd to the *Cod jur gent.* I, § 22; *Caesar -Furst* c 11, *Spec. demonstr pol* pr 1 and 57

Wolff also follows Pufendorf in part

153. In the theory of Wolff (*Instit.* § 96) man is a *persona moralis* or *sittliche Person* in so far as he is regarded as the 'Subject' or owner of rights or obligations, and is thus in a *moralis status* or *sittliche Zustand*, cf also §§ 850, 963, 1030

Daries (*Praecogn* §§ 9, 24) holds that by 'person in the juridical sense', or 'moral person', we mean man 'in so far as he has a certain moral status'—*ex quo manifestum est a personalitate ut ita dicam physica ad personalitatem moralem non valere consequentiam.*

Collective and representative unity

154 Thus Treuer, in a note to Pufendorf's *De off hom et civ* II, c 6, § 5, holds that a 'union of wills' is possible by means of mere *societates et foedera*, without *imperium*—though a union by means of *imperium* is better

Thomasius interprets the personality of the State in exactly the same way as Pufendorf (*Instit jur div* III, c 6, §§ 27, 31, 62–4, 157, *Fund* III, c 6, § 7), but after including the State in the category of *societates mixtae*, which blend the principle of Fellowship with that of Rulership, he proceeds to add to these 'mixed societies' two other forms of society—the *societas inaequalis* of God and man, which rests on the pure principle of Rulership, and the *societas aequalis*, which rests on the pure principle of Fellowship (*Instit jur div* I, c 1, §§ 91–113, III, c 1, §§ 57–74)

Titius ascribes the unity of the personality of the State entirely to the representation of all its members by the Ruler, who has thus a double personality, while the subject only possesses a single personality (*Spec jur publ* I, c 1, §§ 43 sqq , VII, c 7, §§ 19 sqq), but in dealing with the *universitas*, which he relegates altogether to the sphere of private law, he assumes the existence of a purely Collective *persona moralis composita* (*Observ* 94, *Jus priv Rom - Germ* VIII, c 2)

155 *De modo const.* s. I, §§ 2–3 (*Opusc.* I, 1, pp. 286–8), cf also *Elem* I, s 3.

Hert's view that group-unity involves a Representative

156. Cf *Opusc* I, 1, p 288 (*Quod enim de universitate dicitur, eam nec animam nec intellectum habere, non consentire nec dolo facere, hunc alienum est, quoniam universitas pars est tantum civitatis et quacquid juris spiritusve habet, accepit concessu vel expresso vel tacito compotum summae potestatis,* atque hactenus persona est mystica, sive ex praescripto juris personae vicem sustinet; neque dubium est, quin hoc aspectu contrahere et delinquere possit*) Hert accordingly ascribes an absolute representative authority to the *Rector Civitatis* [the Head of the State], but he will only allow to the *Rector Universitatis* [the Head of a corporation] such representative authority as comes within the limits of the powers granted to him by the sovereign (note 3 to Pufend *J. n et g* VII, c 2, §§ 22, and *Opusc* II, 3, p 55).

157. *Opusc* I, 3, pp 27–44

158 Ibid II, 3, pp. 41–7

His theory of one man with many 'persons'

159 In his treatment of the first set of cases [those in which one man sustains several persons], Hert begins by considering the possibility of the same

* 'By the concession of those who are in control (*compotes sunt*) of the supreme power.'

individual being reckoned, upon a *consideratio moralis*, as being several different persons in his different capacities (sect 1, §§1–2) He proceeds to lay down some jejune general rules for such contingencies (sect 1, §§3–7) He then discusses, as cases which come under these rules, (1) the union [in one man] of various rights of status which have their basis in the Family and the State (sect 2), (2) the different capacities enjoyed simultaneously by the Emperor, and by the Estates, in the German Empire (sect 4), and (3) the conjunction of a number of different powers [in the same individual] in the domain of private law (sect 4)

His theory of several men with one 'person

160 In treating the second set of cases [those in which several men sustain one person], Hert begins by attempting to prove the possibility of several men uniting to form a single *persona moralis* There are three sorts of *unum*—the *unum per se*, the *unum per accidens* and the *unum per aggregationem*—according as it is a 'natural', an 'artificial', or a 'moral' bond which unites the parts in question A 'moral body' is brought into being by a 'moral bond', *quo per institutum humanum diversa individua ita colliguntur, ut unum esse intelligantur* (*Proleg* §§1–2). He proceeds to suggest general rules for collective persons [of this moral order] Either a *societas aequalis* or a *societas rectoria* may be the basis (§3) the Group-person may come to possess capacities and rights (e g of legislation, or the power of life and death) which belong to none of the single persons so grouped (§4), the associates continue to remain *certo aspectu singuli* (§5), the rights and duties of the collective person *non sunt singulorum nisi per consequentiam* (§6)

Hert then distinguishes two 'sources' of this 'unity of persons' [in a moral body] The one is '*Lex fingit*', the other is '*Conventio hominum efficit*' Under the first head—that of the feigned unity of persons (sect. 1)—he treats of *paterfamilias et filius* (§§1–7), of *defunctus et haeres* (§§8–16), of *defunctus et hereditas jacens* (§17), of *jus repraesentationis* (§18) and of *Christus et Ecclesia* (§19) Under the second head—that of contractual unity of persons (sect 11) —he deals with *matrimonium* (§§1–3), *civitas* (§§4–8), *universitas* (§§9–11), *correi debendi et credendi* (§§12–15), and *vasalli feudum individuum habentes* with feoffees (§16)

Gundling holds that the State needs a representative

161. *Jus nat* c 3, §52 (*in imperio civili imperantes soli mens civitatis sunt, etsi subjecti non carent mente, sed sapiunt ipsimet, immo aliquando imperantibus sapientiores sunt*), c 35, §30 (*magistratus voluntas est voluntas universorum et singulorum*), c 37, §§2–3 and *Disc* c 34 The *persona moralis seu mystica* only appears, therefore, in Gundling's theory of the State when he is speaking of a republic *Jus nat.* c 35, §34, c 37, §§3–10

He makes a corporation only a collective unit

162 *Dissert de universitate delinquente*, §§1–5 A *universitas* is only a 'multitude' united by 'consent' the object of such consent is *in unum coalescere, ut idem intelligere et velle censeantur* from consent directed to that object *resultat unitas, cujus ratione personae mysticae vulgo audiunt, ac morales compositaeque dicuntur*

His rejection of the theory of fiction

163. Loc. cit §§6–8 *A fictio juris* is in no way necessary to explain this Group-person We can see for ourselves how a unity like that of an individual man comes into existence through the union of the wills of a number of men It does not matter if it is only with the intellect, and not by sense-perception, that we realise the union of the Many in the One, and the distinction of the One from the Many. If it did matter [i e if sense-perception were a necessity], all *res incorporales* would be imaginary, and only what we see or hear or smell or feel or taste would be real, and that is absurd, for since there is

no *demonstratio* without *mentis abstractio*, and no truth without demonstration, we should be driven to saying that truth itself is untrue. .Nor is a *fictio* necessary to explain the assumption of a *consensus universitatis*, for although a *consensus omnium* is not easy to attain, it none the less follows from the nature of a *universitas* (since it exists, but cannot continue to exist without motion, and must therefore necessarily choose *modus volendi aut nolendi possibilis* in order that it may set itself in motion) that 'the will of the major part should count as the will of the whole person constituted by a number of men'

Gundling, however, admits that *universitates certo sensu artificiales sunt quae pactis coaugmentantur quibus Hobbesius non male artificii nomen tribuit* They are not created by nature, but by reflection and will

His insistence on the collective principle

164 We must note, it is true, Gundling's contention (loc. cit §§13–48) that a *universitas* may even be guilty of delict and suffer penalties accordingly But it is also to be noted, first that such delict can only be committed (in his view) by the common action of all, and not by a majority or by the body of managers, and secondly that a *universitas* may also commit murder or similar crimes, while, as for the penalties of delict, it is only the guilty persons (either taken together or severally) who are affected by them, and the abolition of the corporation as such is not regarded as a possible penalty

165 This distinction appears in Kestner, c 7, §3 (cf also Hert, supra p 122) and in Schmier, I, c 3, II, c 3, s. 1, §§1–3, V, c. 1, nos 87sqq and c 2, nos 52sqq

Boehmer on equal and unequal societies

166. According to J H Boehmer, a *societas* means a *complexus plurium personarum unitarum inter se ad certum finem* it constitutes a 'moral body', and the *spiritus* of that body is a union of the wills of all, in one will, such that *conjunctim consideratı unam in moralibus repraesentent personam* In an 'equal society', this 'union of wills' is based upon 'simple obligation', but just for that reason it remains imperfect In an 'unequal society'—though the ground or basis is still an 'association of equals'—the factors of *imperium* and *subjectio* are superimposed, by the 'submission of all wills to the single will of one man or of a whole council', with the result that *voluntas omnium in voluntate hujus ita concentratur, ut quod imperans summus in negotiis ad finem civitatis spectantibus vult, omnes velle moraliter censeantur* (Cf *Jus publ univ P gen* c 2, §4 n *f*, *P spec* I, c 2, §§1–18, c 3, §1 n *o*, §§15–21)

167 Cf Heineccius, *Elem* II, §§13, 115, Mullerus, I, c 1, Wolff, *Instit* §839, Nettelbladt, *Syst nat* §§354–61, Achenwall, II, §§22–39, Daries, *Praecogn.* §§17–23, *P spec* 550sqq , Hoffbauer, pp 194, 199sqq , 205sqq

The State as an unequal society

168 This view explains why the State, as a *societas perfectissima*, was regarded as beginning its existence with the substitution of an 'unequal society' for the original 'equal society' (which is sharply distinguished from 'democracy' (Boehmer, I, c 2, §§6–12), and occasionally even described as 'anarchy' (Daries, §§651sqq)), when the imperfections of this equal society began to make themselves felt It was often urged, too, in the strength of this view, that unity was more perfect in a monarchy than in a republic, where the Ruler in his nature reflected and represented an 'equal society'

Corporations as equal societies

169 The family system of government was generally the only 'unequal society' which was recognised, other than the State, and all corporations, including the Church, were interpreted as being 'equal societies', cf §18, infra [on the natural-law theory of corporations].

Difference of monarchy and republic

170 This is the reason why we often find the conception of the *persona moralis civitatis* treated as entirely irrelevant in regard to monarchy, and only

applied to republics cf Gundling, in n 161 supra Ickstatt expressly says that in a monarchy, where the king represents the whole State and all its members, *totius Reipublicae intellectus atque voluntas in intellectum et voluntatem* personae moralis simplicis *resolvitur*; whereas 'Polyarchy', or the government of Many, involves a *persona moralis composita* *Opusc* II, op 1, c. 1, §§14–16 and 66.

171 Thus J H Boehmer applies the conception of the *persona moralis* of the State only in the sphere of international law *P. gen* c. 2, §§3–7, *P spec* 1, c 3, §22

172 We have already noticed, in n 160 above, the lengths to which Hert was prepared to go in this direction

173 Like Pufendorf and Hert (supra, n 139 and nn 157–60), Nettelbladt, in his *Syst nat* §§82 and 1194 and *Syst pos* §16, and C von Schlozer, in the *De jure suffragii*, §11, both draw this parallel

174 Heineccius allows that every 'society', including the State, is only the result of *consensus duorum pluriumve in eundem finem eademque media, quae ad finem illum obtinendum sunt necessaria*, but he also holds that—in view of the fact that 'one will and one mind' arise, either through *conspiratio in unum* or through *submissio omnium voluntatum* to the will of a Ruler—*omnis societas est una persona moralis*, and possesses, as such, like duties, rights, and even 'affections' (e g life, sickness and death) with the individual Accordingly, he argues, every society confronts not only other societies and individuals, but also its own *socii*, as a distinct 'Subject' or owner of rights (*Elem* II, §§13–25, 115) *Heineccius on the unity of a society*

175 Wolff's general theory of societies (*Instit* §§836–53) is based throughout on the idea of a contract directed to the attainment of common ends by common means, and it is from this contract that he derives the whole system of law, and of rights and duties, which regulates the internal life of corporations—including the authority which 'all taken together' [*allen insgesammt*] exercise over 'individuals' It is only in its external relations, he holds, that 'each society, because its members act with united forces, appears as a single person', and it is particularly in this sphere (of their external relations to one another) that 'a number of different societies are to be viewed as if they were so many free individual persons' Wolff thus finds no difficulty in describing a 'moral person' as the owner in any case of joint property where a number of persons are each deemed to have a share, since in such a case that 'number of persons, taken together, are treated as a single person, and what is true of an individual owner is true of them when taken together' (§196) [Not only does he thus recognise the simple 'moral person' he also recognises compound 'moral persons'] He treats the Family as being a *societas composita*, because the members of which it is composed are not mere 'physical individuals', as they are in a 'simple society', but are 'whole societies which are treated as single moral persons', i e the society of husband and wife, the society of father and child, and the society of master and servant (§977) *Wolff's theory of Groups*

On the other hand [and while he thus recognises a variety of moral persons], Wolff regards even the moral personality of the State itself as nothing more than 'the whole community', in the sense of the sum total of all individuals, including the Ruler (§1030), and the result is, that while he thinks that international law can be based on the character of States as 'free persons living in a natural state' (§§977 and 1088), he never mentions the State as a person in dealing with its system of [internal] public law

Daries' scheme of associations

176 Daries begins by constructing a comprehensive scheme of *jus sociale in genere* on the basis of a conception of *societas* which makes it a *status per quem personae in personam competit jus perfectum atque affirmativum*—or, in other words, a condition which involves a nexus of legal relations by which individuals are either connected with one another by equal rights and duties, or are set over against one another as rulers and ruled (§§517–61) On this basis he proceeds to interpret all societies, up to and including 'civil society' or the State (§§562 sqq) In dealing with the State, he distinguishes the two sorts of nexus between its members—the nexus between the *imperans* and his subjects, and that of the subjects with one another (§§661)—but he makes the *imperans* the one and only 'Subject' of [political] rights (§§655 sqq) He applies the conception of the 'moral person' only in regard to the external relations of a group [and not in regard to its inward unity] Cf *Praecogn* §24, *plures homines, quibus ad commune aliquid obtinendum concessa sunt jura, in uno eodemque statu morali vivunt atque ideo unam personam moralem constituunt*

Nettelbladt's theory of associations

177 Nettelbladt lays the foundation [for his general view of associations] in his theory of *jurisprudentia naturalis generalis socialis* (as stated in his *Syst nat* §§362–414) In expounding this theory he starts from the definition of *societas* as a *conjunctio plurium hominum ad eundem finem conjunctis viribus obtinendum*, and then proceeds to develop in advance all the conceptions by the aid of which he afterwards explains the rights and duties of Family, Corporation, Church and State

178 This is especially the case [i.e Nettelbladt is forced to set the whole over against individuals] in regard to the 'equal society' which possesses *potestas*, for here authority over the individual *socii* is ascribed to the *societas ipsa*, and not, as in an 'unequal society', to an *imperans*, or, as in societies without *potestas*, to an *extraneus* (§§335–46 and 355–6) But Nettelbladt hastens to add that *societas* is to be understood, in such a case, as signifying only *omnes socii simul sumpti*

179 Cf *Syst nat* §§83–6, 329–30, 335, and *Syst pos* §§17 and 865 Nettelbladt does not seek to invoke the idea of a 'fiction' in this connection he prefers to think that *tum eorum intellectus, voluntates et vires sunt ut unus intellectus, una voluntas et una vis, sicque ab uno homine non nisi in corporum numero differunt, quae differentia hic non est attendenda* (§84) He also argues that while the conceptions of birth and death are not applicable to such a person, its origin may be compared to birth and its dissolution to death (§85) But he always identifies the 'moral person' with *plura individua humana simul sumpta* (§83), and thus he says of the State, *Cives alicujus Reipublicae simul sumti persona moralis sunt, quae est ipsa Respublica* (*Syst nat* §1122; cf §§1132–3, 1200, 1403 sqq)

Achenwall's theory of associations

180 Cf *Proleg.* §§92–3 a *societas*, as a body of men, *considerata generatim, abstrahendo nempe ab iis quae hoc vel illud singulum ejus membrum concernunt, spectari nequit nisi tanquam ens unum* Since it is a whole of which the parts are men, it has the same natural rights and duties as each of its members, except in so far as the 'very nature of society' constitutes a difference It is therefore a person, though it is called a 'moral' or a 'mystical person', or a 'moral' or a 'mystical body', to distinguish it from the individual, who is a 'single person', and the whole system of the natural rights and duties of individuals is accordingly applicable to it, except in so far as *diversa hominis individui et societatis natura* makes modifications necessary These modifications are then developed in II, §§16–21.

Achenwall's individualism

181. Note, in this connection [i e as showing the individualistic basis of Achenwall's thought], the account which he gives, in developing his theory of *societas in genere* (II, §§2–40), of *jus sociale universum internum* (ibid. §§5–13). He always interprets this *jus* as consisting in the reciprocal rights and duties which belong to individuals as *socii*—i e the rights and duties which spring from their 'social juridical nexus', and are thus to be distinguished from their rights and duties as *homines*, though if more than two members are concerned [so that it is a case not of A versus B, but of $A + B$ etc versus C], he regards the sum of reciprocal rights and duties as involving a *jus sociale universorum in singulos singulique cujuslibet in universos* On this basis, in an 'equal society' in which the 'right and obligation of all' are the same, there is no internal unity of the group transcending the aggregate of *universi*, and the *voluntas societatis qua unius personae* is thus identical with the *communis consensus sociorum* (II, §§22–31) In an 'unequal society', on the other hand, there is added to the collective unity [i e the unity of the aggregate of *universi*], which also exists in such a society [just as it does an 'equal society'], the further factor of representation of all, to a greater or less degree, by the *imperium* (II, §§32–9).

He reduces Groups to collective bodies

182 Already in his *Prolegomena* (§92) we find Achenwall contending that the conception of the 'moral person' can only be applied to any society *respectu non-sociorum*, and that it is therefore limited to 'particular societies' (It cannot apply to the 'universal society of all men',* the existence of which is supposed in *Proleg* §§82–90 and in I, §§43–4) Accordingly, he only introduces the 'moral person' into his general theory of society when he is dealing with *externum jus sociale* (II, §§14–22), cf the dictum in §15, *quum socii conjunctis viribus ad communem finem agant, atque ideo jura ac obligationes cum tali fine talique virium usu connexae ipsis communes sint, societas est persona moralis et ab* exteris *tanquam talis spectari debet et potest* While holding this merely Collective conception, he finds no difficulty in regarding the Family—with its three relationships of husband and wife, parents and children, master and servant—as a 'compound society' whose members are 'mystical' and not 'individual' persons (*Proleg* §94, II, §§78sqq)

Scheidemantel has some idea of a Group-person

183 He says of the State (I, pp 32sqq) that from the union of the powers and wills [of individuals] with the commands of its Head 'there arises a Whole, a composite being independent of other societies, which evinces itself in action determined by its own understanding and will, and is therefore capable of having rights and obligations—in other words, a civil society, a people' In the same way he describes societies other than the State as 'composite persons' (III, pp 244sqq) See also I, pp 64 and 157sqq , III, pp 408sqq , and n 120 supra

The basis of the rights of majorities on the old view

184. This had been the theory adopted—after Grotius had set the example (see n 74 to §14)—by Pufendorf (n 145 to this section), Thomasius (*Instit jur div* III, c 6, §64), Gundling (n 163 to this section), Wolff (*Instit* §§841–5, where it is argued that by the nature of society all must concur in an agreement that the will of the majority shall be regarded as being the will of all), and Nettelbladt (§388, where the majority-principle is said to exist by the very nature of the *persona moralis*, and by virtue of *jura societatis socialia*) The fullest argument in favour of this view is to be found in Ickstatt, *de jure majorum in conclusis civitatis communibus formandis* (*Opusc* II, op. 1)

* It cannot apply to the 'universal society,' because that society, as its name indicates, includes all men, and there are therefore no *non-socii*.

He appeals, in the first place, to the nature of the 'moral person', as a unity possessed of reason and will, which must determine its decisions, in any case of *motiva disparia*, by the *motiva fortiora*—though it is only the external [or quantitative], and not the internal [or qualitative], weight of 'motives' that can settle the issue He then adduces, as a further argument, the possibility of removing a dead-lock between the different elements of the group-will which is provided by the use of majority-decision, and he also appeals to practical exigencies But he maintains, notwithstanding (c 1, §§65–68), that the majority-principle is based on *pactum* [which is somewhat inconsistent with the idea that majority-decision proceeds from the nature of the moral person as a unity]

A peculiar view appears in Daries (§§750–62), who, in the spirit of primitive Teutonic law, demands unanimity, though he also assumes an *obligatio perfecta* of the minority to accede to the decision of the majority

New demand for unanimity

185 In his treatment of what he calls this 'great controversy', Christian von Schlozer (*De jure suffragii*, §§9–14) cites Grotius, Locke, Pufendorf, Petroni, Cocceji and Schlettwein as supporters of the earlier '*communis opinio*' which regarded the validity of the majority-principle as derived from Natural Law. He describes the opinion of Wolff (unjustly) as doubtful The main authorities he cites for his own view (which makes only unanimous decisions valid *per se*) are Hobbes—whose real doctrine, as stated in n. 74 to this section, is very different—and Rousseau. He also cites Achenwall (who does, as a matter of fact, identify the *voluntas societatis qua unius personae* with the *communis sensus sociorum*, II, §§24–8, and treats the validity of majority-decisions as a deviation—though a useful deviation—from the general rule of unanimity, secured by a special contract to that effect), and he cites in addition Wedekind, Hopfner, Kohler and Schmalz

A L von Schlozer on the idea of the People

186 According to A L von Schlozer 'majesty' belongs originally to the people, but since the people is 'the whole of all the children of men', it can do as little with its sovereignty as a child can do with a fief which has fallen to it Any real sovereignty of the people [as a whole] is altogether inconceivable, because the integrity of such sovereignty has already been destroyed [in any existing form of the so-called sovereignty of the people which we can actually observe] by the exclusion of women, minors and paupers, by the introduction of the majority-principle, and by the erection of a representative assembly cf p 97, §3 and pp 157–61 [Since the people can thus do nothing with its original sovereignty], that sovereignty is devolved upon a Ruler, who may be either a number of persons or a single person, but if a number of persons be the Ruler, a '*Unum morale* must be pretended by that number' [i e they must feign themselves to be a single unit] cf pp 73–8, 113, §1 Schlozer proceeds to describe such a collective Ruler as a 'being composed of several individuals' or a '*corpus*', but [though he thus seems to recognise group-existence,] he really remains a thorough-going individualist, even to the extent of holding that in a republic 'a new Ruler is created for each new decision of the government' [because a new majority composed of different individuals has to be created], and therefore a 'momentary Ruler' is all that can exist in such a State cf p 113, §2, p 125, §9, p 131, §13

The common will a sum of wills

187. The 'common will', which (he remarks) thinkers from Rousseau onwards have irresponsibly identified with the 'common man',* is nothing

* Or, as we might express it, the 'general will' (which is the term that Rousseau really uses) is too readily identified with the 'general run' of people Or again, to

but the 'sum of all individual wills', and therefore it is only sovereign in pre-political society, where pure unanimity is the rule In the organised State, even if it be an extreme democracy, it is always a number of particular persons, or a single person, which wills and decides for all The people, which gives such persons or person their commission, is simply tricked, by means of frequent elections, into thinking that it wills and decides through its representatives, or it is dazzled with the illusory idea that 'law is the true sovereign'—the fact being that law, as an abstract thing, can only act through men [and therefore can only be sovereign through the person, or persons, who declare and enforce it] Cf pp 76–7 [of A. L von Schlözer's *Allgemeines Staatsrecht*, which Gierke is paraphrasing here, as in the previous note]

The will of the Ruler as representative

188 The social contract, according to A L von Schlozer, produces only a 'union of powers', and a 'union of wills' first arises through a supplementary contract of government, by which each man promises that 'others shall will instead of him, and that he will acknowledge this will, external to himself, as his own will, and shall be compelled, if he break his word, to recognise that it is his will' It is this fact (that 'the most part renounce their will, and transfer it to one man, or to a number of men, or to the majority') which is the basis of majority-decisions, representative assemblies and the rights of rulers, op cit pp 76–9, 93, § 1 The Ruler, being able to will and decide for all, is the 'depository of the common will', pp 95 and 100

C von Schlozer on the majority-principle

189 C von Schlozer, *De jure suff in soc aeq.* (of the year 1795), § 11 In agreement with the theory of his father (A L von Schlozer), he adds that the *societas mere talis* is only a 'union of powers' to begin with, a new 'pact', by which each man surrenders his will, is necessary before a 'union of wills' can exist, and the comparison with a *persona* is only permissible when that pact has been concluded He proceeds (§ 12) to attack the other arguments of the advocates of the majority-principle, on whom he significantly seeks to impose the burden of proof (§ 10) He frankly holds that any decision of any society requires an agreement of *all* its members, depending on their *pactum et consensus* (§ 9), and accordingly he will only recognise a decision by the *major pars* if it is based on special *pacta adjecta* to that effect (§ 15)—with the proviso that these *pacta adjecta* can never extend to the *pacta fundamentalia*, or the *jura singulorum*, or affect either (§ 18) He will not even allow that the absent are automatically bound by the vote of those present (§ 13) such a principle can only be introduced by *specialia pacta* (§ 19)

Hoffbauer's theory of groups

190 Cf p 190 'the conception of a moral person can thus be understood in the broad sense in which it includes every collective "Subject" or owner of rights and duties, whether such collective "Subject" be a society or no' See also pp 53, 66, 106, 206, 244, 292, 307sqq , 310, 317sqq

put the matter in another way, we may say that the *volonté générale* properly means a will that is general in respect of the quality of the object willed (which is the general good), but tends to be identified with a will that is general only in respect of the quantity of the subjects willing (or the general mass of the people) The confusion is inherent in Rousseau's thought, but it must be added, in fairness to Rousseau, that he did attempt to reconcile the two conceptions, feeling that the general mass, by the process of discussion of ideas which is the essence of the democratic system, was most likely to arrive at a general sense of what was really for the general good In other words, the process of general thought, in the general body of a community, is the right way to the general good, which is the object of the general will and the sovereign standard of community-life.

Hoffbauer's theory of Groups

191 Pp 191sqq and 199sqq originally, unanimity was alone valid, but the majority-principle may be introduced by means of a unanimous resolution, provided that it be understood that the majority-principle has no validity in regard to the constitution, or as against the rights of a member.

192 Pp 205sqq accordingly (Hoffbauer argues) it is the Ruler alone—or some 'society' which participates in Ruling authority—that appears in the area of internal public law as a 'moral person' (pp 244, 246, 292, 307, 310), and the People itself appears as a person only in the area of [external, or] international law (pp 317sqq.).

193. W. von Humboldt's *Ideen*, p 130, cf §18 infra [on the natural-law theory of corporations]

194 See, more especially, II, c 7, §89, c. 8, §§95–9, c 12, §145.

195 II, c 8, §96

Locke on the majority-principle

196 II, c 8, §§97–9 without a provision to that effect, the original contract would not achieve its aim of ending the state of nature, it would not produce at all, or would only produce for a brief space, a society with the qualities of a 'body incorporated' it would thus be without significance, and not a real contract at all

Rousseau on the moi commun *of the body politic*

197 I, c 6 *à l'instant, au lieu de la personne particulière de chaque contractant, cet acte d'association produit un corps moral et collectif composé d'autant de membres que l'assemblée a de voix, lequel reçoit de ce même action son unité, son moi commun, sa vie et sa volonté* [The reader will readily note, in this passage as elsewhere in the *Contrat Social*, how much Rousseau is indebted to the writers of the School of Natural Law alike for his thought and his vocabulary His *personne particulière* is the usual *persona singularis* his *corps moral et collectif* is the *corpus morale collectivum* We may almost say that the vogue of Rousseau depends on the fact that a great master of style gave to the world of letters, and the general reader, a system of thought which had hitherto been expressed mainly in Latin, and written by lawyers for lawyers]

See in addition II, c 2, on the indivisibility of sovereignty which issues from the unity of the *corps social*, II, c 4, on the nature of sovereignty as an absolute power which the social body necessarily possesses over its members, just as the individual has *un pouvoir absolu sur ses membres*, and III, cc 10–11, on the sickness, age and death to which *corps politiques* are subject in the same way as the physical bodies of men, and on the art of prolonging their existence (*le corps politique, aussi bien que le corps de l'homme, commence à mourir dès sa naissance, et porte en lui-même les causes de sa destruction*). [On the birth and death of 'moral bodies' cf supra, nn 174 and 179]

Its personne morale *the 'Subject' of Sovereignty*

198. Cf I, c 6, where Rousseau explains that the *personne publique*, which is constituted by the union of all other persons, is called *République* or *corps politique*, but that it is also termed by its members (1) *État*, when it is passive, (2) *Souverain*, when it is active, and (3) *Puissance*, when it is compared with similar bodies outside Cf also I, c 7, where he speaks of a *personne morale*, or *être de raison*, which in regard to foreign bodies is *un être simple*, and in regard to its subjects is *le Souverain* II, c · speaks of *un être collectif*, and II, c 4, where a *personne morale* is m the 'Subject' of political authority

Its volonté générale

199 II, c 3 *Il y a souvent bien de la différen ître la volonté de tous et la volonté générale, celle-ci ne regarde qu'à l'intérêt co n, l'autre regarde à l'intérêt privé et n'est qu'une somme de volontés particulières s ôtez de ces mêmes volontés les plus et les moins qui s'entredétruisent, reste pour ne des différences la volonté*

générale. [It is interesting to compare Rousseau, on this fundamental matter, with Pufendorf· see nn 131, 132, 136 There is of course a difference, but Pufendorf is the rock from which Rousseau hewed]

200 IV, c 2, where we also find an argument to prove that liberty is not destroyed by this agreement to respect majority-decisions It is my own will that the *volonté générale* should be law. if I am out-voted, that shows that my view about the *volonté générale* was mistaken I really willed what is now shown to be the *volonté générale*, and I did not really will what is now shown to be only my *volonté particulière* Cf also II, c 2 n *Rousseau on majority-decisions*

201 It is presumably always directed to what is right and beneficial it is incorruptible, simple and clear, without subtleties, and attained with little if any debate It will not, and cannot, decree anything contrary to equality and justice no guarantees are needed against it, and all that is required is the prevention of any deception Cf I, c 7, II, cc 3–4, IV, c 1 *On the quality of general will*

202 I, c 6· *à l'égard des associés, ils prennent collectivement le nom du peuple, et s'appellent en particulier Citoyens, comme participans à l'autorité souveraine, et Sujets comme soumis aux lois de l'État*

203 It follows that the size of the State diminishes liberty With 10,000 citizens, each has one ten-thousandth part of sovereign power 'for his share' with 100,000, only one hundred-thousandth part, but in both cases each is *soumis tout entier* Cf III, c 1

204 I, c 7, each pledges himself by the social contract *sous un double rapport comme membre du Souverain envers les particuliers, et comme membre de l'État envers le Souverain*, a contract thus made *avec lui-même* is possible, because each contracts *envers un tout dont on fait partie* Cf II, c 4

205 I, c 7, II, cc 1–2, III, c 16

206. But the Sovereign can never incur such obligations towards a third party as contravene the act on which its own existence depends I, c 7.

207 The reason why the Sovereign can never bind itself as a whole to its members is this (I, c 7) the body politic, being only able to view itself always under one and the same *rapport*, would by contracting with one of its own members be *dans le cas d'un particulier contractant avec soi-même* [i e since the sovereign is, and must always regard itself as being, identical with its members, it cannot contract with what is itself, any more than an individual can contract with himself But the original contract of society is apparently an exception to this rule, cf n 204 supra] *His Sovereign can never bind itself to its subjects*

208. III, c 12–14 Any formal exclusion of a single citizen annuls the general will (II, c 2 n)

209 Cf III, cc 14, 18 cf also the argument, in III, c 11, that the sovereign will of yesterday does not bind that of to-day (*la loi d'hier n'oblige pas aujourd'hui*), and therefore the validity of [past] laws depends on the presumption that the sovereign is always confirming them tacitly by not revoking them * *Yesterday's will not binding to-day*

210 III, c 12 the sovereign can only act *quand le peuple est assemblé*

211 Cf. II, c 1. *le Souverain qui n'est qu'un être collectif ne peut être représenté que par lui-même* Cf also III, c 15 sovereignty can no more be represented than it can be alienated, because though power can be transferred to others, *Rousseau on representation*

* Cf Paine's *Rights of Man*, where the same idea is applied to each generation 'Altho' laws made in one generation often continue in force through succeeding generations, yet they continue to derive their force from the consent of the living and the non-repealing passes for consent'.

will cannot be elected deputies of the people cannot be representatives, but only commissaries or delegates What *le Peuple en personne* does not enact is not law, the people which is 'represented' is no longer free, and no longer a people

The 'organic' metaphor in Rousseau

212 Although the legislative power is compared to the heart of the body politic, and the executive to its brain, and the importance of both for political life is measured by that comparison (III, c 11), this solitary reference to the analogy of the organism remains without influence on Rousseau's general interpretation of Group-personality [But cf also note 197 supra]

Rousseau's view of 'Government'

213 III, cc 1–5, 16–17 The *gouvernement* is *un corps intermédiaire* between the Sovereign and the members of the State it is *un tout subalterne dans le tout*, it is a new *personne morale dans la personne publique* Since its province is simply the execution of the sovereign will, and since, in its capacity of *ministre du Souverain*, it holds a commission which can be limited at will and is always subject to recall, the 'government' has no will of its own, but has merely *une vie empruntée et subordonnée* None the less it requires, if it is to fulfil its object, a unity of its own and its own special qualifications, and it therefore develops, in virtue of the authority with which it is vested, *une vie réelle, un moi particulier, une sensibilité commune à ses membres, une force et une volonté propre, qui tend à la conservation* It is thus, in small, *ce que le corps politique qui le renferme est en grand* There are different ways in which it may be constituted, but it is always a Whole with a definite totality of power, part of which it employs in order to keep its own members in co-operation, while it retains the rest for the purpose of acting upon the whole people Three wills meet in this government—the individual wills of its component members, the common will of them all, and the general will of the whole State—but in a perfect condition of things the first of these would be non-existent, and the second would only be the expression of the third

It is a collective person

214 In III, c 1, Rousseau terms the 'person' of the government a *personne morale et collective, unie par la force des lois et dépositaire dans l'État de la puissance exécutive.* Its essential difference from the sovereign 'person', he holds, consists in the fact that it only exists in virtue of the Sovereign, and not, like the Sovereign, *per se* As a whole, it is called the 'Prince', and its members, who may be collective persons themselves in their turn,* are called 'magistrates' In a monarchy, however, the government (according to III, c. 6) is identical with a *'personne naturelle' toute au contraire des autres administrations, où un être collectif représente un individu, dans celle-ci un individu représente un être collectif*

215 Filangieri (I, cc. 1 and 11, VII, c 53) follows Rousseau's theory entirely

Sieyès generally follows Rousseau

216 Cf Sieyès, I, pp 50sqq , 129, 144 ('a political society cannot be anything but the associated members of such society when taken together'), 167, 445sqq , II, pp 195sqq

217. Cf I, p. 129 the common will is a unity, but its essential elements are the wills of individuals, only they are no longer isolated Cf also I, p. 145, where it is said that 'the will of the individual is the only element in the social will', and I, p. 167, where the will of the Nation is said to be 'the result of the will of the individual, because the nation is a sum of individuals', and where it is argued accordingly that this will can never be mediated or

* I e a 'college' of magistrates, which, as such, is a collective person, may be one of the parts of government.

expressed by estates or corporations, but only by heads [i e by direct individual suffrage], on the basis of a general unity and equality. Similarly Sieyès remarks (I, p 207) that the common will of a social group 'must naturally be the general sum of the wills of all individuals', cf also pp 431 sqq

218 Cf I, pp. 144–5, 167, 207–8 for the future, he argues, we must ascribe the quality of a general will to the will of a majority this is based on the fact that each submits himself freely in advance, with a reservation of the right to emigrate [if he disagrees with the majority-will] his staying in the country is a tacit confirmation of the obligation he originally assumed, and thus the common will always continues to be the sum of individual wills

But Sieyès admits representation

219 For Sieyès' views on representation see I, pp 68 sqq , 129–30 (where he speaks of government conducted by proxy, and of the representative will of an assembly of deputies, in which the common will is, as it were, in commission), 134, 149 sqq , 195 sqq , 208 sqq (where deputies are described as representatives, with a general mandate, which remains none the less at the free disposal of those who gave it, and is thus revocable as well as limited, so that the decision of the representatives is 'the product of the generality of the wills of all individuals'), 375 sqq , 385 sqq , II, pp 275 sqq and 372–4 (where it is argued that everything in the social state is a matter of representation, and that men increase their liberty when they allow themselves to be represented in as many ways as possible, just as they diminish it when they accumulate a number of different representative capacities in one person)

220 Cf II, pp 371 sqq there is, essentially, only one political authority, but there are different forms of representation based on different mandates

221 This is the case with Scheidemantel, the Schlözers (father and son), and Hoffbauer, cf pp 126–7 supra, and nn. 183 and 186–90 to this section.

Fichte and Rousseau

222 Cf Fichte's *Naturrecht*, II, pp 19–21 (*Works*, III, pp 204–6) it is only 'hypothetically' that the individual is also a subject, for he only becomes such *if* he fails to fulfil his duties Cf also *Works*, VII, pp 153 sqq

223 See, for all this, the *Naturrecht*, II, pp 15–18 (*Works*, III, pp 202–4) cf also II, pp 23–4 (*Works*, III, pp 207–8)

224 *Naturrecht*, II, pp 17, 19, 23–4, 34 sqq (*Works*, III, pp 203, 204, 207–8, 215 sqq) In the later *Rechtslehre* (*Posthumous Works*, II, pp 495 and 632) he still holds that the whole is only the 'totality of the members', and that there can be nothing in the whole which does not exist in a part

Fichte on moral persons

225 Thus he remarks that 'physical, or mystical, persons' may either of them exercise public authority, but he proceeds to explain a 'mystical person' as being the majority at any given time, and therefore as 'frequently also a variable person', *Naturrecht*, I, pp 191 and 195 (*Works*, III, pp 159 and 161) Again, arguing that marriage is a natural and moral society, he counts husband and wife as 'one person', and he draws the conclusion that, within the household, there is complete community of property, though externally the one 'juridical person' is represented by the husband alone, who can act for his wife along with himself similarly a married couple, as one juridical person, has only one vote, which is given by the man, though his wife may also give it on his behalf in the popular assembly if he be prevented from doing so, but unmarried and independent women have their own right to vote (*Naturrecht*, II, pp 158 sqq and 213 sqq = *Works*, III, pp. 304 sqq and 343 sqq). Cf. also II, p 1 = *Works*, III, p 191

226 *Naturrecht*, II, p 250 = *Works*, III, p 371 *Rechtslehre*, p 638

227. *Naturrecht*, I, pp 122sqq and 180sqq = *Works*, III, pp 102sqq and 150sqq · *Rechtslehre*, pp 507sqq and 627sqq No account can be given here of the subtle chain of deduction by which Fichte attempts, in his *Naturrecht*, to solve 'by a strict method' the problem 'of finding a will such that it is simply impossible for it to be other than the common will, or, in other words, a will in which private will and common will are synthetically united', nor can we attempt to describe the modifications in the solution of this problem which are introduced in the *Rechtslehre*

Fichte on the majority-principle

228 *Naturrecht*, Introduction, III, and vol I, pp 198, 217sqq , 225 sqq = *Works*, III, pp 16, 164, 178sqq , 184sqq Absolute unanimity is needed not only for the political contract, but also for every alteration of a 'constitution based on Right and Reason' (though *any* person may take in hand the transformation of a constitution which is not based on Right into one which is) relative unanimity is sufficient for the election of individual magistrates, and also for decisions of the people in regard to a magistracy or Ephorate which has offended against Right, i e a very considerable majority (say seven-eighths) may exclude dissentients from [participating in the action of] the State on such issues

229 *Naturrecht*, I, pp 179sqq , 196, 201sqq , 206, 210–16, 222sqq = *Works*, III, pp 150sqq , 163, 166sqq , 170, 173–7, 182sqq , see also *Works*, IV, pp 238sqq For the exercise of its sovereignty the People must assemble as the 'community', though in great States it need not assemble in one place, but may gather 'here and there in really considerable bodies'

Fichte on representation and on 'Ephors'

230 *Naturrecht*, I, pp 179sqq and 192sqq = *Works*, III, pp 150sqq and 160sqq In order that the common will, which shows itself primarily in the unanimous will of all, may always remain a really common will, the exercise of public authority must be transferred to one or more persons (the Executive), and this transference involves in its turn the appointment of representatives of the people to watch the Executive (the Ephorate, or body of 'overseers'). The reason which Fichte gives is significant since both the law-breakers and the injured persons, who represent private wills, are simultaneously also members of the community, it follows that the community [if *it* attempted to deal with the conflict, instead of leaving it to its representatives] would be both judge and party to the suit in the case at issue between the two sides [We may note that Fichte's 'Ephorate' has an ancestry it goes back through Althusius to Calvin, cf supra p 248]

The People always finally Sovereign

231 *Naturrecht*, I, pp 192, 204–9, 224 = *Works*, III, pp 160, 169–73, 183 thus he speaks of the responsibility not only of the government, but also of the ephorate, of the final decision of the community, of the right of revolution in the last resort, and of the total cancellation, by the community's immediate declaration of its will, of any assumption seeming to suggest the *expression* of that will by those who are really its *executors*

232 *Naturrecht*, I, pp. 213–15 = *Works*, III, pp 175–7.

233 Such an organic conception appears in the *Grundzüge des gegenwärtigen Zeitalters* (*Works*, VII, pp 144sqq), the *Reden an die deutschen Nation* (ibid pp 380sqq), and the *Staatslehre* (ibid. IV, pp 409sqq and 419sqq)

234. In particular, he never attains any conception of the State's personality

235. See Kant's *Metaphysik der Sitten*, *Works*, VII, pp. 1 and 20.

236. *Works*, VII, pp 120–3 and 142–6

Kant's view of States as moral persons

237. *Works*, VII, pp 161 and 165, and the essay *Zum ewigen Frieden*, VI, pp 405sqq Kant derives the whole of international law from the axiom that States stand to one another in the position of 'moral persons' in the state of nature—subject, however, to an obligation of Right that they should enter into a system of legal relations Arguing that it is wrong to abolish the existence of the State as a moral person, and to turn it instead into a mere 'thing', he deduces from that argument the illegality of arrangements by which one State can acquire another, as if it were a thing, through inheritance, purchase, exchange or donation, or by which 'States can marry one another', as has hitherto been the usage in Europe [cf *tu, felix Austria, nube*]

Authorities in the State moral persons in Kant's view

238 The three powers are 'the united common will expressed in three persons' (*Works*, VII, p 131) they are 'co-ordinated' with one another 'as so many moral persons', but at the same time they are also 'subordinated', under a system by which each of them, 'while commanding in the capacity of a separate person, issues its commands under the limits imposed by the will of a person who is superior' (ibid. VII, p 134) The supreme Head of the State can be either 'a physical or a moral person' (ibid VI, p 323, VII, p 134) the high court of justice is 'a moral person' (ibid. VII, pp. 25 and 97) People and Sovereign, 'legally considered, are always two separate moral persons' (VII, p 138)

Kant on State and People

239 Kant often opposes the 'State', in the sense of the Ruler, to the 'people' (e g VI, pp 418 and 421), but, conversely, he often defines the 'State' as 'a union of a multitude of men under rules of law' (VII, p 131), and he thus identifies it with the 'People' (VII, p 133)

240 *Works*, VI, pp 327sqq , VII, pp 131 and 133 The people becomes a State when *omnes ut singuli* surrender their external freedom, in order to receive it back again at once *ut universi*, 'as parts of a common existence, i e of the people regarded as a State', all now decide about all, and therefore each about himself, and since no man can do wrong to himself, this is the origin, and the only origin, of binding law

Kant on the will of the People

241. *Works*, VI, pp 327–8 and 416–20, VII, pp 54, 62–3, 66–7, 106, 131–2 Kant always speaks of the 'will of the whole people', 'the agreement of all', 'the united will of a whole people', 'a collectively general (or common) will vested with power', 'the united will of all', 'the consentient and united wills of all', etc In doing so, however, he limits the right to join in expressing this will to those who have the right to vote—a class which does not include those who work for wages—though he admits the principle of equal voting by heads within this class (VI, pp 327–8)

242 *Works*, VI, pp 328–9, cf pp 331 and 336, where the Supreme Head of the State appears as the 'representative' or 'agent' of the sovereign power, and where it is argued accordingly that 'his will gives commands to his subjects, as citizens, only because he represents the general will'

Kant on 'phenomenal' and 'noumenal' Man

243 Cf VII, pp 36–7, where Kant, arguing that the theory of law, like that of morals, is a theory of duties, contends that man can and must be considered, from the standpoint of such theory, 'in the light of his attribute of possessing capacity for freedom—a capacity which is wholly supra-sensual —and therefore in the light of his pure human character, as a personality independent of physical determination, in contradistinction to himself in his other character of a being affected by such determination, i e a member of the human species (*homo phaenomenon*) ' See also p 153, n E, where Kant

explain it a subject who is undergoing a penalty is, as such, a different ... the 'co-legislator' who enacts the penal law 'When I pass a penal law against myself as a law-breaker, what happens is that the pure law-giving Reason in me (the *homo noumenon*) subjects me to that law as one capable of breaking it, and therefore as another person (the *homo phaenomenon*), at the same time that it subjects all the other members of the civic association' Cp the consequences derived from this distinction [of noumenal and phenomenal man] in the *Tugendlehre* (pp 195sqq , 222, 241sqq , 244sqq), where they are made to include (1) the possibility of a duty which one must enforce upon oneself, (2) the absolute value of persons, as ends in themselves, and never means to ends outside themselves, and (3) the possibility of being one's own court of law

244 Cf *Works*, VI, pp 329sqq , VII, pp 158–9 and especially p 173

The survival of the 'organic' metaphor

245 We find such analogies with the organism drawn by a number of writers Spinoza (cf *Tract pol* c 2, §15, c 3, §§1, 2, 5, and *Eth* IV, prop 18 schol) generally describes the *civitas* as *unum corpus* with *una mens* Pufendorf (*J n et g* VIII, c 12, §7) expounds a theory of the 'three species of bodies' (natural, artificial and moral), and ascribing to the moral species a unity which is produced by a *vinculum morale*, and remains constant through all the changes in its composition, he concludes that the State, as an example of the moral species, *est res quaedam unica et continens, animalis instar* Hertius, in the *De modo const* sect 1, §§2–3, speaks of *una quasi persona, seu unum corpus*, which remains identical through all changes and preserves permanent attributes, and of an *anima in corpore*, existing in virtue of an *imperium*, cf his *Annotationes* to Pufendorf's *Jus nat et gent* I, c 1, §3 n 4—*quamquam negari queat entium moralium et naturalium magnam interdum esse similitudinem, e g corporis humani et civitatis, quae etiam corpus vocatur et animam sive vitam habere dicitur* (see also p 122 supra) Analogies with the organism are also drawn by Gundling, *De univ delinq* §§6–8, Schmier, I, c 3, no 66, J H. Boehmer, *P spec* I, c 2, §§1–2 (*corpus morale*, and *unus spiritus*), Achenwall, n 180 to this section Note also the elaboration of the analogy with the various limbs and organs of the natural body by Knichen (*Opus pol* I, c 6, th 11, where head, eyes, tongue, ears, hair, arms, feet, joints, heart and neck are found for the *corpus mysticum ad corporis viri verique modum concinnatum*, and reference is made to the similar, if in some respects different, *jeux d'esprit* of Guevara, Facius and Hobbes)

246 Cf supra, nn 195, 197 and 224 to this section

The idea of the mechanism

247 This idea [of an artificial imitation of the living organism] appears in Spinoza, loc cit We also find it in Pufendorf, who expressly commends the analogy with *homo artificialis* (n 144 to this section), and argues (*J n et g* VIII, c 12, §7) in favour of the permanent unity of the 'moral body' from the axiom laid down by Hobbes in his *Philosophia prima*, c 2, §7, that *si res alicui propter formam talem, quae sit principium motus, nomen inditum sit, manente eo principio idem est individuum* The idea also appears in Hertius (supra, n 148 and n 160 to this section), in Gundling (n 163 to this section), and other writers, cf. also Horn, supra p 115

248. Cf. supra, pp. 128–130 and 131–4. Rousseau even describes the governing body, in so many words, as a *corps artificiel* which is created by another *corps artificiel*, III, c 1.

249 We thus find the analogy of the organism entirely absent from the writings of Thomasius, Wolff, Daries, Nettelbladt, the Schlözers (father and

son), Hoffbauer, W. von Humboldt and Kant Mercier de la Rivière explicitly says that a nation is not a *corps unique*, and that it has no single will. *ce qu'on appelle une nation en corps n'est donc jamais qu'une nation rassemblée dans un même lieu, où chacun apporte ses opinions personnelles, ses prétentions arbitraires et la ferme résolution de les faire prévaloir* A majority is never more than a 'collection of interests' and a variable 'result of egoisms', and unanimity is impossible (c. 18)

The State a machine

250. A L von Schlozer says (p 3) that 'the most instructive way of dealing with the theory of the State is to treat the State as an artificial machine, entirely composed of assembled parts, which has to operate for a definite end', cf pp 99, 157 Kant similarly speaks of the 'mechanism' or the 'machine-like character' of the constitution of the State, and describes the State as 'the mechanical product of the union of the people by coercive laws' (*Works*, VII, pp 157–8) Sieyès, though he does not wholly succeed in avoiding the comparison with a body (I, pp 283 sqq and 445 sqq), bases the State entirely on 'the mechanics of social art' which reason provides (I, pp 128, 195 sqq , 217 sqq , II, p 370) [Tom Paine, would-be engineer and bridge-builder, similarly uses mechanical analogies in his *Common Sense* of 1776 e g 'as the greater weight will always carry up the less, and as all the wheels of a machine are put in motion by one , it only remains to know which power in the constitution has the most weight , for that will govern']

Failure to face the problem of Group-personality

251 We find this [failure to face the problem of Group-personality] in Praschius, Placcius, Alberti, Filmer and other anti-individualist thinkers It is also to be found in Justi It is true that he emphasises strongly the organic nature of the 'moral body', arguing that the commonwealth is 'a single indivisible body, which has the closest connection in all its parts', and seeking to prove, by this argument, the necessity of a single group-authority controlled by a rational will, the existence of a system of mutual interaction by which all the parts affect one another and the whole, and the pernicious results of any superfluous part which contributes nothing to the general system But he has nothing whatever to say about the personality of the State or the people (cf his *Natur und Wesen*, §§ 23–6, 28, 45–50, and his *Grundrisz*, §§ 15, 17, 23 sqq , 29 sqq)

252. Mevius for example, though he makes it the object of political association *ut una velut persona sit, cui una mens, unus sensus, una voluntas et anima inter multos velut una atque eadem*, makes the unity of this person depend for its existence entirely on the submission of all other wills to the will of a representative Ruler (see n 125 to this section) In the same way S de Cocceji will only recognise a representative and collective unity of [group-]persons,* notwithstanding the fact that he extends the conception of the social body, with authority over its members, until it is made to embrace the State, the Corporation, the [College of] Magistrates and the Family The result is that all these bodies remain for him *corpora artificialia seu mystica*, except that the Family is *magis naturale* than the rest. Cf his *Nov Syst* §§ 199, 205, 280–1

Leibniz's theory of associations

253. Leibniz argues (*Nova methodus*, § 16) that the legal 'Subject' (the *subjectum* of a 'moral quality' which may be either a right or an obligation) can be either a *persona* or a *res* Defining the former as a *substantia rationalis*, he then distinguishes between *personae naturales* (*Deus, angelus, homo*) and

* I e they are 'one' in virtue of being 'represented' by a single agent, or 'one' in the sense of being a collective aggregate of wills, but not 'one' inherently and in themselves.

persona civilis (collegium, quod quia habet unam voluntatem certo signo dignoscibilem—e g. ex pluralitate votorum, sorte, etc.—ideo obligare et obligari potest). He regards a *res* as the 'Subject' of rights and duties when e g. property is left to an *officium*, or an *officium* is made responsible for some act, and generally in any case of *jus reale.*

He describes a *persona civilis seu moralis*, in so many words, as a *persona ficta*, brought into existence *ad instar naturalis* by an artificial union of wills, and to be regarded, in the last resort, as an aggregate or collection of rights *In jure reipublicae persona ejus civilis seu moralis continetur, nam omnes personae civiles seu fictae corporum, collegiorum, universitatum in aggregatione jurium consistunt* (*Spec. dem pol* prop 1, p. 525) *persona civilis omnium jurium collectio est* (ibid prop 57, p 585), cf. also the Introduction to *Cod gent dipl.* I, §22, p 306, and *Caesar -Fürst* c 11. He regards the person of the State as identical with that of the Ruler, and he makes it accordingly a *persona naturalis* in a monarchy, but a *persona civilis* in a republic (Introduction to *Cod gent dipl* loc cit., *Caesar -Fürst*, loc cit , *Spec dem pol* prop 1, 12, 57) In international law, therefore, both 'natural' and 'civil' persons are in his view 'Subjects' of rights (Introduction to *Cod gent dipl* loc cit), but he argues that if friendship is nowadays rare *inter principes* (*Spec. dem pol* prop 41, p. 560), neither friendship nor enmity is possible *inter Respublicas* Such feelings arise *ex animo*, and *animus non nisi personarum naturalium est, civilium nullus*, and [while the 'civil person' of a republic thus cannot have friendship or enmity with another State, because it has no *animus*, neither can the 'natural persons', or individuals, who constitute such a corporate person, because these] natural persons and their *animi* are in a state of perpetual flux (ibid prop 42, p 561)

For a critique of the view recently advanced by C Ruck (*Die Leibnizsche Staatslehre*, Tübingen, 1909)—that Leibniz understood the personality of the State in our modern sense, and created the legal notion of 'organ' to express the relation of the Ruler to that personality—see the author's review in the *Deutsche Literaturzeitung* of 1910, pp 566–8

No real idea of Group-personality in the eighteenth century

254. Any such legal conception of Group-personality is not to be found in Montesquieu, Vico or Ferguson Frederick the Great has some elements of the conception on the one hand, he represents the State as an animate body with limbs and organs, and explains its birth, its maladies, its death, and the peculiarities of its nature, by means of a comparison with the individual man (*Antimach.* cc 3, 9, 12, 20; *Considérations*, in his *Works*, VIII, 24, *Essai sur les formes*, ibid IX, 197 sqq): on the other hand, he regards the Ruler as only [an 'organ', or] *le premier serviteur et premier magistrat de l'État* (*Antimach* c 1, *Mémoires*, in his *Works*, I, 123, last Testament, ibid VI, 215, *Essay*, ibid IX, 197), but in spite of these two complementary ideas he never attains to any clear expression of State-personality

Justus Möser knows nothing of any 'person' of the State (*Patriot Phant.* I, no 62) he even disputes the right of a nation to give itself freely a new constitution, on the ground that it is 'not a single being in itself', but is composed of two classes which, if either is united internally, are only connected together in their relations with one another as separate parties to a contract (*Misc Writings*, I, pp. 335 sqq.).

Herder again—however vigorously he may champion the idea of development, however resolutely he may insist on regarding the life of a people as the common life of an organism, however frequently he may speak of a

national spirit and a national character—none the less fails to transcend a mechanical conception of monarchical institutions when he seeks to analyse actual States (*Ideen*, IX, c 4, XIX, c 6) While he traces 'the first breath of a common existence' in the constitutions of towns, guilds and universities, he never carries his account of the 'body politic' to the point where he reaches the conception of an immanent Group-personality (ibid XX, c 5).

§ 17 THE NATURAL-LAW THEORY OF THE STATE

Universal public law

1 Cf Huber, I, c 1, §§12–23, Hert, I, 1, pp 1sqq., J H Boehmer, *P gen* c 3, §§11sqq., Schmier, *Jus publ univ.*, *Diss praeambula*, Daries, *P spec* §§654sqq , Achenwall, II, §§85–7, Heincke, *Proleg* c. 1, §10 By all these writers *jus publicum universale* is identified with *jus publicum naturale*, or with a part of *jus sociale naturale*, and the distinction drawn between public law and political theory is explained as consisting in the fact that the State is considered in the former *ratione justi*, and in the latter *ratione utilis* J H Boehmer was the first to compose a separate compendium of *jus publicum universale* [or, as French writers express it to-day, '*droit constitutionnel comparé*'] under that title

Attacks on the theory of 'double majesty'

2 At first we find no distinction drawn, by those who are engaged in attacking the older doctrines, between the pure theory of the sovereignty of the people and the theory [of the co-existence] of *majestas realis* and *personalis* cf. Micraelius, I, c 10, §§12sqq and qu 7, pp 112sqq , Cellarius, c 9, §§18–25, Felwinger, *De maj* §§22 and 41, Huber, I, 2, c 3, §24, I, 3, c 1, §§11–20, Pufendorf, *J n et g* VII, c 2, §14, c 6, §4, and *De off hom. et civ.* II, c 9, Thomasius, *Instit jur div* III, c 6, §121, J H Boehmer, *P spec* I, c 4, §22 n *t* and III, c 2, §5, n *x*, Schmier, II, c 1, s 2, §1, nos 48sqq

Gradually, however, both of these theories [that of popular sovereignty and that of 'double majesty'] were lumped together, and any conception of *majestas realis* was stigmatized as a product of 'monarchomachism' Horn [who wrote about 1660] is already condemning 'real majesty' as a *monstrum* and *fabulosus foetus* indeed he even declares the theory of 'real majesty' a criminal theory, and expresses a pious wish for the execution of its advocates, adding that, if they live in a neighbouring 'plebeian' State, a request addressed to that State for their execution would be warranted by international law (II, c 10, §§11–15) See in addition Ziegler, I, c 1, §§44sqq , Boecler, II, c 1, pp 93–8 (where the theory of real majesty is said to be a theory of *regicidae*), Becmann, c 12, §11, Hert, *Opusc* I, 1, pp 307–19, Kestner, c. 7, §9, Stryck, *Diss.* XIV, no. 7, c. 2, no. 54, Gundling, *Jus nat* c 38, §22 (such theories are *inventa otiosi ingenii*), Alberti, c 14, §3, Heineccius, *Praelec* I, c 3, §§8–9 and *Elem jur nat* II, §§130sqq , Rachelius, I, tit 32, §2 (the theory is *summa pernicies*), Heincke, I, c 2, §15, c 3, §4, Kreittmayr, §5; Scheidemantel, I, pp. 111sqq (where even the theory of Rousseau is described as a theory which makes 'real' majesty exist by the side of 'personal', and is controverted accordingly).

Fortunes of Grotius' theory of the subjectum commune

8. Thus Becmann writes (c 12, §7): *subjectum majestatis est tum Respublica seu persona moralis quam Respublica induit, tum personae singulares quae moralem istam repraesentant* But what he understands by *Respublica* is no more than *universi* or *omnes simul*, and he proceeds to assume a system under which this collective body is represented by the *Imperans* so perfectly that neither is superior or subordinate to the other, but the one stands to the other in the same relation as an object does to its reflection in the mirror Cf also Treuer, on Pufendorf, *De off hom. et civ* II, c. 7, §9 (*respublica perpetuum majestatis subjectum manet*), Rachelius, I, tit. 32, §2, Mullerus, I, c. 7, §65.

4 Schmier, for example, holds that it is possible to follow Grotius in assuming both a *subjectum commune* and a *subjectum proprium*, provided that the distinction be interpreted as it is by Boecler and van der Muhlen in their notes to Grotius—i e provided that it be understood to refer merely to the inseparable connection of majesty with the *corpus reipublicae rite formatum* and the possible reversion of that majesty to the people (II, c 3, s 1, §1) Kulpis (in his *Exerc ad Grotium*, II, §6 n) and Hert (p 298, §12) take a similar line. Ickstatt interprets the *subjectum commune* of Grotius as signifying merely the original sovereignty of the people, and he therefore prefers to substitute the terms *subjectum constitutivum* and *activum* [for *subjectum commune* and *proprium*], cf. *Opusc* II, no 1, c 1, §12

5 Cf Horn, II, c 11, §1, Pufendorf, *J n et g* VII, c. 6, §4, *De off hom et civ* II, c 9, Kestner, c 7, §9, Boecler, *Instit* II, c 1, Alberti, c 14, §3, Stryck, *Diss.* XIV, no 7, c 2, no 55, Heincke, I, c 2, §15, c 3, §4

6 Cf supra, pp. 111 and 115–6, see also, for answers to Horn's theory, Huber (I, 3, c 2, §§7–9) and Pufendorf (*J n et g* VII, c 5, §5, *De off hom et civ* II, c 8, §4)

Sovereignty the same in all forms of State

7 See Spinoza, *Tract theol -pol* c 16, *Tract pol* c 6sqq , Micraelius, I, cc 10, 13–15, Huber, I, 3, c 2, I, 7, c 1, Pufendorf, *J n et g* VII, c. 5, *De off hom et civ* II, c 8, Leibniz, *Spec. pol dem* prop 16–18, Hert, *Opusc* I, 1, pp 319sqq , Titius, VII, c. 7, §§17–28, Bossuet, II, art 1, J. H Boehmer, *P spec* I, c 3, §13, c 4, §§29–34, Schmier, I, c 3, Heineccius, II, §§116sqq , Wolff, *Instit* §§990sqq , *Jus nat* VIII, §§131sqq , Daries, §§747sqq., Nettelbladt, §§1133, 1153sqq , Achenwall, II, §§149sqq , Scheidemantel, I, pp 39–40, Hoffbauer, pp 206 and 295sqq , A L von Schlozer, pp 75sqq and 95, §2 The last of these writers states 'the Ruler is the Ruler, the depository of the common will, be he one, or some, or many crown, sceptre and throne are *essentialia* in Schaffhausen and in Stamboul'. This principle 'overturns once and for all the insolence of the single ruler, and awakens the democrat from his dreams of liberty' [i e it shows to the one that he is but a depository, who has received his authority as a *depositum*—'a thing for custody, to be redelivered on demand'—as it shows to the other that even in the democracy of his dreams there cannot be absolute liberty, without any sceptre or throne, since while there is a society with a common will man cannot be, as Shelley dreamed,

> Sceptreless, free, uncircumscribed, the king
> Over himself]

On the other hand we find Gundling contending (*Jus nat* c 37, §§3–10 and *Disc.* c. 36) that, while there is rule by *una persona* even in a republic, this 'person' is only *moraliter una*, and the process of deliberation which must necessarily precede its decisions makes the *suprema potestas* weaker.

8 Cf Huber, I, 2, c 3, and his *Opera minora*, I, no 2, c 7, Pufendorf, *J n et g* VII, c 2, §14, c 6, §§4sqq., Alberti, c. 14, §3, Hert, *Opusc* I, 1, pp 311sqq., Gundling, c 37, J H Boehmer, *P spec* I, c 4, III, c 2, Titius, VII, c. 7, §§20–6, H Cocceji, *Prodromus*, S Cocceji, §§617–18, Schmier, II, c 4, s 2, §2, no 109sqq , Heineccius, II, §138, Ickstatt, *Opusc* II, op 1, c 1, §§14–15, Kreittmayr, §5

9 In developing these ideas, the thinkers of this age were no more successful in eluding the contradictions which they inevitably entailed than those of a previous age had been (cf supra, p. 43 and n 43 to §14) Most of them assumed that there must have been, even in a democracy, a formal *translatio imperii*, which had taken the form of a contract of subjection made with a permanent popular assembly or a majority thereof (See Micraelius, c. 10, §§9sqq , Huber, I, 2, c 3, §§25sqq , c 4, §§1sqq , Pufendorf, *J n et g* VII, c 5, §§6–7, *De off hom et civ* II, c 6, §9, Beemann, c. 12, §§4sqq., Hert, *Opusc* I, 1, pp 286sqq. and 317sqq , Kestner, I, c 7, §3, Heineccius, II, §§129sqq , Daries, *Praecogn* §24 and *Jus nat* §§658–60, Ickstatt, §§8sqq) Those who made this assumption were forced to suppose that the other party to the contract [i e. the party other than the permanent popular assembly or a majority thereof] was either (1) the sum of all individuals, or even (2) a minority of those individuals,* and they were thus compelled to make democracy an exception from the general scheme which they applied to all other forms of State [Strictly speaking, we may argue that on the first hypothesis, i e the hypothesis that the sum of all individuals contracts with the popular assembly, there will be no exception from the general scheme, which makes *all* individuals contract with a Ruler, but there will be the difficulty, or the absurdity, that the two parties to the contract are the same, and *A* is merely contracting with *A* On the second hypothesis, i e the hypothesis that a minority of individuals contracts with the majority of the popular assembly, this difficulty or absurdity disappears, because the parties are different, but there is now an exception from the general scheme, because it is only a minority (and not, as in the general scheme, *all*) which is the other party to the contract with the Ruling authority]

The problem of interpreting democracy in terms of contract

Other thinkers dropped the idea of a contract of subjection altogether in treating of democracy, and only spoke of a separate agreement or decision (following on the primary contract of society) to retain sovereignty instead of transferring it This idea, which agrees with the doctrine of Suarez, appears particularly in Schmier, II, c 1, s 3, §3 and c 4, s. 2, §3, and he is led by its logic to argue that the reversion of original sovereignty to the people [in a case where that sovereignty has not been retained, but transferred] does not *ipso facto* produce a democracy, but only the possibility of instituting either that or another form of State [according as the people, now in possession of the reversion of its sovereignty, decides either to retain it or to transfer it] The idea may also be traced in Wolff, *Instit* §982 and *Jus nat* VII, §§37 ff , Nettelbladt, §1132, and Achenwall, II, §§96–98 and 174–179 But the thinkers who propounded this idea failed to explain how the nature of social authority could be changed [i.e how vague popular sovereignty could pass into a definite democratic authority] when the 'Subject' of such authority underwent no change

10 Spinoza, *Tract theol-pol* c. 16, *Tract pol* cc. 6–11. It is true that

* The other party which contracts with a majority of the popular assembly may naturally be supposed to be the minority.

Spinoza on monarchy

Spinoza regards an *omnino absolutum imperium* as desirable only in a democracy, which he considers the most natural and perfect of all forms of State—or, to a less extent, in an aristocracy. But just for this reason [i e just because he confines absolutism to democracy or aristocracy], he rejects monarchy, as being a form of government which is necessarily absolute by its very idea, and he substitutes for it a mixed constitution. [Strictly speaking, Spinoza does not 'reject' monarchy. He argues that, *potentia* being *jus*, the form of State which has most *potentia* will have most *jus*, and he criticises monarchy accordingly, *not* because it is absolute, but because it cannot be absolute—in other words because one man cannot, however much he may try, possess as much *potentia* (by which Spinoza means mainly power of intellect) as a number will possess, and cannot therefore possess as much *jus* Having criticised monarchy as defective in power, and therefore in right, Spinoza proceeds to fortify it, in the seventh chapter of the *Tractatus politicus*, by a great council, which will bring intellect to its service, and by a number of other devices. We may call this a mixed constitution, and it is, in effect, a mixed constitution, but Spinoza was thinking of a fortification of monarchy, and not of a mixture of different political elements. On his own theory monarchy remains, in its fortified condition, as a possible form of State—not rejected, but not preferred, even in its fortified condition, to other forms]

11 Filmer, who rejects in his *Patriarcha* all forms of State except monarchy, regards monarchy as necessarily absolute

French theories of monarchy

12 Bossuet (II, art 1, III, art 2–3, IV, art 1; V, art. 1, VI, art 1–2, VIII, art. 2, X, art. 6) argues that the people cannot be conceived apart from the Monarch, because he is *l'État même*, and while *lois fondamentales* may secure liberty and property, they only bind the monarch [internally,] in virtue of the authority which they derive from God and reason, and never oblige him externally A similar view appears afterwards in the Physiocrat absolutists, who simply eliminate the theocratic elements in the older theory cf. Mercier de la Rivière, c 14, p 102, c 17, p 129, cc 19, 23–4 (the only rational form of State is a legal despotism, an absolute hereditary monarchy, where, the private interest of the monarch coinciding with the interests of his subjects, the mathematically evident and inevitable principles of the *ordre social* reign undisturbed)

German writers on monarchy

13. Cf Cellarius, c 9 ('he who is limited by fundamental laws is no longer sovereign'), Pelzhoeffer, II, c 3, Becmann, c 12, §§4–7, Boecler, II, c. 1 Mevius also (*Prodromus*, V, §§23sqq) regards all the rights of the *universitas* as absorbed in its single, plenary and exclusive 'representation' by the will of the Ruler, and holds that by the law of nature the *potestas imperantium* is necessarily *una, summa, absoluta, soluta legibus et rationibus non obnoxia.* On the other hand the supreme authority must do nothing whereby *societas pereat vel infirmetur* it must not, therefore, bring the State under a foreign yoke, alienate land, alter the fundamental laws or exercise tyranny (§30), and it must use *bona publica* only for *usus publici*, and impose taxes only in case of necessity. Cf , in the same sense, Alberti, c. 14, §§3–10

Horn's view of monarchy

14 Horn, *De civ* II, c 10, §§1–15. In a limited monarchy, *summa potestas* resides exclusively in the monarch, and it is only its 'exercise' which is limited· the monarch can therefore, in case of need, break even the rules of the constitution, which can never be anything more than a contract to which he has freely assented The obligation imposed on him by an oath to the

constitution is only a religious obligation, and he can never be deposed, because he has no *Superior*

15 Pufendorf attacks Hobbes for making the two conceptions [that of 'supreme' power, and that of 'unlimited' power] interchangeable. cf *J n et g* VII, c 6, § 13

16 *J n et g* VII, c 2, § 14, *De off hom et civ* II, c 6, § 11, cf n 132 to § 16

17 *J n et g* VII, c 2, § 14 If *populus* is understood to signify a 'Subject' or owner of rights (*unum aliquid unam habens voluntatem et cui una actio tribui potest*), it becomes identical with *civitas* and its will becomes identical with that of the Ruler, and thus the paradox holds good in a monarchy that *Rex est populus* But if *populus* is understood to mean the *multitudo subditorum*, as contrasted with the *homo vel concilium habens imperium*, it ceases entirely to be a unit to which any ownership of rights can be ascribed, and the theory of the 'right' of resistance, which confuses *multitudo* with *populus* and proceeds, on the basis of that confusion, to the impossible conception of a rebellion of the *civitas* against the *Rex*, is as absurd as it is seditious On the other hand individual subjects of the State continue to be the possessors of separate wills, although they are merged in a *corpus morale* with *una voluntas* (*J n et g* VII, c 4, § 2, *De off hom et civ* II, c 7, § 2), and as possessors of separate wills, they continue to be 'natural' Subjects or owners of rights, to whom the Ruler owes obligations and to whom he may do an injustice (*J n et g* VII, cc 8–9, VIII, c 1, *De off hom et civ* II, cc 9, 11) But individuals cannot appeal to any coercive sanction in support of their natural rights they must endure the misuse of the State's authority as men endure storms and bad weather. they must go into exile themselves rather than expel their ruler, but they may be competent to resist if the worst comes to the worst and the fundamental contract itself is broken (*J n et g* VII, c 8, *De off hom et civ* II, c 9, § 4)

Pufendorf's view of popular rights

As compared with this exposition, Pufendorf's attempt to prove the possibility of an obligation existing between *optimates* and *cives* in an aristocracy is both obscure and involved in self-contradiction In dealing with this possibility, he not only invokes the argument that, although *populus ut persona moralis expiravit*, the *personae physicae* are still there he is even willing to contend that the people does not become a *multitudo dissoluta* (though it ceases to be a *persona perfecta*) after the transference of its sovereignty, and he alleges in favour of this contention the argument that 'at any rate when there is a Senate, to serve, as it were, as its head, the people forms a person' (*quia utique jam cum senatu tanquam capite suo personam constituit*, cf *J n et g* VII, c 5, § 8) [Pufendorf's view appears to be that while a people with a king as its head is not a person, a people with a Senate as its head *is*, and his reason may perhaps be that while there is some similarity between the people and a Senate, and while the two may both somehow be 'persons', there is a great difference between the people and a King, who is so distinct from his people that he is a unique 'person', and they in comparison are only a *dissoluta multitudo* But whatever his reason may have been, he certainly falls into self-contradiction, for after proclaiming (in the preceding paragraph) that there is only *one* 'State-person', he allows *two* to enter in an aristocracy (1) the 'person' of the *concilium habens imperium*, and (2) the 'person' of the people, with this council serving as its head]

Normal monarchy and State-property

18 *J n et g* VII, c 6, §§ 13–17 In dealing with *bona publica* Pufendorf follows a similar line [to that which he follows in dealing with political

authority]: he assigns ownership of such *bona* to the *civitas qua talis*, and he ascribes to the king only the position of a 'tutor', debarring him from alienating *bona publica* except by consent of the people. *J. n et g* VIII, c. 5, §8, *De off. hom. et civ.* II, c 15, §5. At the same time he regards a monarch appointed for a fixed time as something inconceivable

19. *J n. et g.* VII, c 6, §§7–12, *De off. hom. et civ.* II, c 9.

Thomasius on monarchy

20 *Instit. jur div* III, c. 6, §63 (definition of the State as a *persona moralis composita*, which can will and act as a unit through the Ruler), §§115–26 (on the nature and attributes of majesty), §§127–31 (on the difference between an *imperium absolutum* and an *imperium limitatum* with fundamental laws), §§132–41 (on the possible varieties in the *modus habendi*) But Thomasius prefers to call 'non-patrimonial monarchies' by the name of *fidei commissaria* rather than by that of *usufructuaria* (§135),* he does not consider a *monarcha temporarius* to be absolutely inconceivable (§§122–6), and he does not allow that there can ever be a right of resistance to the sovereign (§§119–20).

21. *Spec jur publ* VII, c 7, §§17–28 and 30 In a *civitas* which is *una, vera et perfecta*, constitutional limitations do not affect the *suprema potestas*, but only the *modus exercendi*

Gundling on monarchy

22. To some extent, indeed, Gundling may be said to be nearer to the theory of Hobbes he follows him, for example, in the interpretation he places on the original contract (cf supra, pp 60 and 108), in his conception of the Ruler as the soul of the State (cf n 161 to §16 above), and in the description he gives of the authority of the State (*Jus nat* c 36 and *Disc* c 35) But he recognises contracts made with subjects as binding (*Jus nat* c. 12, §§43–6 and *Disc* c. 11, §§43–6), and he limits the principle that in a normal State the people has no right of resisting the Ruler who breaks his contract, by remarking that, all the same, no injustice is done to a tyrant when he is expelled (*Jus nat* c 38, §§19–23 and *Disc* c 37, §§19–23)

23. The commentators on Pufendorf similarly adopt his views (e g Otto, Treuer, etc), although with some reservations

24. H. Cocceji, *Prodromus*, S. Cocceji, *Novum syst.* §§617–18, 633 (there can be no alienation of territory without the consent of the people, except in *regna patrimonialia*), and §638 (there is no right of resistance)

25. *Diss* XIV, no. 7, *De absoluta principis potestate*, c 3, and *Diss* IV, no 1, *De statibus provincialibus*, c 1, nos. 22sqq. and c. 4

26. *Opusc.* II, op 1, c. 1, §§13–15 (see n 170 to §16 above) and §66.

27. *Grundrisz*, §§5, 11, 32, 34, 35.

28 *Systema*, I, c. 3, §§5, 13, 26, III, c. 1 (there is never a *jus resistendi*).

29 The same homage to Pufendorf's authority is also, and especially, to be seen in the treatises which describe the positive public law of the German territorial principalities

J H Boehmer on sovereignty and its limits

30 Boehmer, like other thinkers of his time, regards the personality of the State as residing entirely in the *Imperans* (whether a person or a body of persons), and he makes the will and act of this *Imperans* count, externally and internally, as the will and act of all for every purpose falling within the area of the State's function (*P. spec.* I, c. 2, §18, c. 3, §§1, 15–21) This representative 'Subject' or person necessarily possesses, as its *jus proprium et independens*, a 'majesty' which vests it with two sorts of consequential rights—the rights of free action appertaining to the state of nature (so far as external

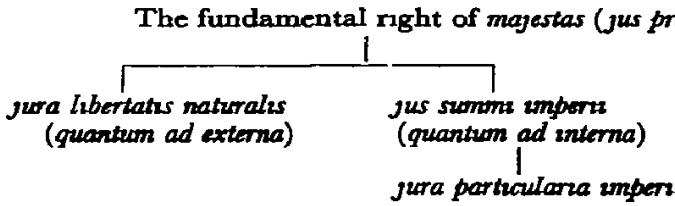
* See nn. 30 and 35 infra, on the difference.

relations are concerned), and the *jus summi imperii* (including all the particular powers required by the State's function), so far as internal regulation is concerned (ibid. I, c 4) * But though this 'majesty' is indivisible, equal at all points, all-embracing, permanent, and subject to no positive law, the sovereign who possesses it still remains bound by the *lex naturalis* (*P gen* c. I, §§ 14–22). He has therefore duties as well as rights in regard to his subjects, and these duties are derived partly from the nature of civil society [as based upon natural law] and partly on specific contracts [which rest upon the same basis] On the other hand the obligation thus arising, if it is *perfecta* for his subjects, is only *imperfecta* for him, and therefore there is never any right of coercion or resistance as against him (*P spec* I, c 2, §§ 18–21 and III, c 2, §§9–25) Further, it is only individual *subditi* who confront the sovereign as 'Subjects' or owners of rights the community of the people, as such, has no personality (ibid. III, c 2, §§4–6)

Boehmer admits that there are various forms of State, 'according as the nexus constituted by pacts is stricter or looser' On the one hand, there are *regna hereditaria*, where *imperium* has been extended, by means of contracts to that effect, beyond the limits required by the State's function on the other, there are *regna limitata*, where the Ruler is subject to limitations imposed by contract, and there are also hereditary and elective monarchies (or *imperia patrimonialia et non patrimonialia*), though the latter must not be called by the name of *usufructuaria*† (ibid I, c 3, §§30–6, II, c 3, § 15, III, c 4, § 15). But the people never has any share, *stante imperio*, in the exercise of political authority, and it has therefore no legislative or judicial capacity, and no right of resistance or deposition (I, c 3, §§25–6, II, c. 3, § 14, III, c 2, §§4–16 and c 4, §§32–3) If, therefore, the sovereign is bound by *leges fundamentales, qua pacta*, he alone can interpret such laws or pacts, and he cannot be forced to observe them (III, c 2, § 13 and c. 4, § 16) Should he break the rules of the constitution, the people is bound to obey, and even if the *clausula nullitatis* be added to any rule—e g. if the performance of an act of government without consultation of the representatives of the people be expressly declared to be null and invalid—the nullity of an act done in contravention of that proviso can only be established by the next successor, and not by the people itself (I, c 4, § I) The position is different, Boehmer allows, *vacante imperio*, since sovereignty reverts to the people in the event of such vacancy Even here he adds a qualification (III, c 4, pp 9–11) Vacancy, he argues, can occur in a non-patrimonial monarchy without the consent of the people coming into play, as the result of an *alienatio regni* [in which case there will be no reversion to the people, and no consent of the people]. [See also n 33 infra]

31 Kestner, for example, though he follows Pufendorf in other respects

* Boehmer's argument may be illustrated by a pedigree



† Cf supra, n 20, where Thomasius is quoted as rejecting this name in favour of *fidei commissaria* For the difference between the two, see n 35 infra, and Huber's explanation there given.

(c. 7, §§3sqq), allows the people a *jus resistendi* where there is evident tyranny (§19).

32. We find this view in Ludewig, I, 1, op 8, c 1, Kestner, c 7, §§11–12; Heineccius, II, §§147–9 On the other hand the conception of the patrimonial State is retained not only by Thomasius, Cocceji and Boehmer (see nn 20, 24 and 30 supra), but also by Huber (I, 3, c 2, §§16sqq), Schmier (II, c 2, s 2, §3), Wolff (*Instit* §986), Nettelbladt (§1198), Achenwall (II, §§158–73), and others

Vacancy of the throne and the rights of the People

33 J H Boehmer, for example, expressly treats *de juribus subditorum vacante imperio* (*P. spec.* III, c 4) He distinguishes two cases of vacancy· (1) *totalis interitus reipublicae,* which dissolves the 'body civil' and leaves the ground clear for a fresh act of association (§§2–3), and (2) simple disappearance of *imperium,* which transforms any State in which it occurs into a democracy, and thus makes the people capable of a fresh *translatio imperii* (§§4sqq) A testamentary disposition by a deceased Ruler does not bind the people in the latter of these cases, even if he were competent to alienate his kingdom (§§7–8) * Vacancy of *imperium* may arise through an alienation made *ultra vires* (§§9–11), or through death (§§12–16), if there are no rights of succession to prevent the vacancy (§§17–27), or through abdication (§§28–31); but not through deposition (§§32–3) [We may remember the vote of the Convention Parliament of 1689—that James II 'has abdicated the government' (or *imperium*) and 'the throne is thereby vacant' On the other hand we may also remember that 'abdication' here was a euphemism for deposition]

Cf Thomasius, *Instit.* III, c. 6, §§67–114, *Fund* III, c 6, §§9–10, and Boecler, II, c 1

Absolutist views of popular rights

34 Filmer and Bossuet reject simultaneously both an original and a reversionary sovereignty of the people In a similar way we find Horn deriving the succession to the throne from the expressed or presumed will of the previous Ruler (II, c 9, §§7–18), and refusing to allow any eventual reversion of *majestas* to the people, though he concedes the reversion of an original *jus eligendi,* II, c 11, §1 [provided there be no expressed or presumed will of the previous Ruler?] He regards the people without a Ruler as a *corpus sine anima,* and therefore a *cadaver* [but how, we may ask, can a *cadaver* exercise a *jus eligendi*?]

Huber on monarchy

35. Huber, *De jure civ.* I, 2, c 1, §§16, 20, c 3, §24, cc 5–7, I, 3, cc 1–2 Even in *imperia herilia* or *despotica,* he argues, all that is added is simply an increase of the *efficacia* of majesty (I, 3, c. 2, §§10–15) Conversely, if we turn [from these absolute forms to the less absolute, i e] to *imperia patrimonialia* and *non patrimonialia* (and the latter of these, Huber remarks, is not a case of a mere right of usufruct, but of a limited right of property, properly to be regarded as a quasi-usufruct, and analogous to a *fidei commissum* or the property of a man in his wife's dowry),† we merely find a difference in the

* *Ergo,* the will of the King of Spain in 1700, leaving his possessions to the grandson of Louis XIV, did not bind the people of Spain

† These subtleties are fascinating A King who rules a non-hereditary monarchy (e g. a King of Poland in the seventeenth and eighteenth centuries) has neither a mere usufruct in an *imperium* which is the property of another, nor the full ownership of an *imperium* which is his own property He is in a half-way house, which, however, is nearer to ownership than to usufruct He is like a man who is the holder of what we may roughly call a trust-property (the *fidei commissarius* of Roman Law),

modus habendi of majesty [but not in 'majesty' itself], ibid. §§16–31. It is a matter of indifference, Huber adds, whether the *summa potestas* is acquired *volente* or *invito populo*, by election or by inheritance, in perpetuity or for a period (§§32–50), and the size and style (i e form) of the State are matters of no significance (§§51–6). See also his *Instit Reip* 1, cc 3–5

He admits limits on the monarch

36. *De jure civ.* 1, 2, c 3 We must neither follow Hobbes in exaggerating sovereignty to a point at which the people becomes a mere flock of sheep (§§3–8), nor the author of the *Vind c Tyr* and Althusius and other writers in minimising it until Rulers become nothing more than *ministri populorum* (§9). The truth is that a contract between king and people is the basis of their relations (§§17–20), and in interpreting this contract we must start neither from Hobbes' view that the people necessarily devolved the whole of its rights, nor from the view of Althusius that the people could not in any way alienate its supreme authority, but rather from the assumption that there is at one and the same time a real alienation of majesty and a reservation of popular rights which limit its exercise (§§21–51). Cf 1, 2, cc 4–7, 1, 3, cc 1, 4–5, *Opera minora*, 1, no. 2, cc 1–7

37 *De jure civ* 1, 3, c. 5. Fundamental laws are binding in virtue of natural [and not of positive] law they are not to be confused with 'privileges' or *pacta cum singulis*

He allows rights of the People

38 Rights of the people [as a whole, and as against the government] exist even in a democracy, where they arise from the limits imposed on majority-government (1, 2, c 3, §§39–51) they also exist, to the same extent, in an aristocracy and a monarchy when the case is one of *translatio simplex* (ibid c 5) Cf 1, 3, c 4

39 *De jure civ* 1, 3, cc 4–5

His theory of express fundamental laws

40 Huber (in 1, 3, c. 5, §§23sqq) investigates these limits [limits imposed on the ruler by 'express fundamental laws'] in some detail If we start from a theory which makes all limitation of the *summa potestas* purely 'constitutional' in character [i e dependent on express constitutional rules], we are not precluded by our basis from believing in a provision which makes the assent of the people, or an *approbatio in senatu*, a necessary condition of the validity of certain of the Ruler's acts (1, 3, c 2, §57), nor are we, again, precluded from believing in a voluntary submission of the Ruler to private law and the civil courts (1, 9, c 5, §§7–25) What we *are* precluded from holding, on that basis, is that the Ruler can really be bound by ordinary positive law, or subject to any coercion whatever, for we cannot suppose [as we should have to suppose if we tried to hold such a view] either (1) that the Ruler possesses a power of command and coercion over himself, or (2) that the people can be legally secured in the possession of such a power over him—except, indeed, at the price of a simultaneous cession by him of part of the *imperium* (1, 3, c 1, §§10, 24–38, 1, 9, c. 5, §§26–49) But the people possesses a right of resistance in defence of its rights against a Ruler who breaks his contract, since the question then raised is one of natural, and not of positive law (1, 9, c. 3); and the people may even punish a tyrant

or he is like a husband who has a sort of property in his wife's dowry Just as the former's trust-property is subject to the request (or 'precative disposition') of the testator, and as the latter's property in the *dos* is subject to certain limits in favour of his wife, so the king in a non-hereditary monarchy has a property subject to the 'request' of his people, or to certain limits in favour of his people. And the people itself is a testator, or a wife, or anything else, but not a living or masculine proprietor

when once he has proceeded to forfeit his *imperium*, either by violating the *lex commissoria*, or by manifestly going beyond his rights (I, 9, c 4).

Huber identifies the State and the Ruler

41. For this identification of the person of the State with that of the Ruler, cf the following dicta in Huber's *De jure civili civitates per eos qui habent summam potestatem personae fiunt* (I, 3, c 6, §26), *summa potestas est ipsa civitas* (I, 9, c. 5, §51); *voluntas imperantium est voluntas civitatis* (I, 3, c. 2, §14 and c 6, §26), again, because the *civitas jus personae habet*, the Ruler (who is the *civitas*) can bind by legislation his individual subjects, who are *diversae personae*, but he cannot bind himself (I, 3, c 1, §32) [since that would be a case of the same 'person' binding and being bound at the same time] See also I, 9, c. 5, §§65–72. It follows from Huber's argument that if the Ruler submits himself voluntarily to the courts in private-law cases, he is prosecuted and sentenced *nomine suo in semet ipsum.*

Yet he recognises the People as a universitas

42 Huber argues, with particular reference to the opposite opinion of Hobbes, that the people, when transferring sovereignty, *unum quod est*, it retains the *jus personae* [after that transference], and remains a *universitas, quamvis nec congregatus sit neque sciat tempus futuri conventus*, and therefore it can have rights against the Ruler, and, in particular, can effectively reserve such rights [at the time of transference], or acquire them by virtue of subsequent contracts (I, 3, c. 4, §§8–83 and c 5, §§58–9)

He would limit all governments by popular rights

43. Starting from democracy as the form of State which approaches nearest to the state of nature, Huber begins by enumerating the reservations which are implicitly made [in favour of the whole people] under a democratic constitution, when the will of the majority is made the Ruling Will (I, 2, c 3, §§25–51 and c. 4), and he then argues for the existence of the same reservations [in favour of the whole people] in *all* forms of State, on the ground that the Ruler in any form of State has merely taken the place of the majority (ibid. c 5) But he goes further, and he argues with some warmth in favour of express constitutional limitations on 'majesty', such as are common in monarchies, but are seldom to be found in democracies, and only infrequently in aristocracies, where they are particularly necessary (I, 3, c 4, I, 7, c 1, I, 8, cc. 2–4) In our century of oppression by princes [the seventeenth], he says, it is particularly necessary to champion the cause of liberty, but if it is particularly necessary in monarchies, it is also necessary in Republics (I, 2, c 8)

44. [There is a contradiction involved in Huber's attempt to limit democracy by the rights of the people, because] in dealing with democracy he tries to assign to a minority the popular rights which he vindicates elsewhere for the community. He assumes the existence of two pacts (one between *singuli* and *singuli*, and the other between *minor pars* and *major pars*), and vindicates a *facultas resistendi* for the minority in the event of a breach of the latter of these pacts [by the majority], cf. I, 2, c. 4, §§1–25.

45. Cf e.g. Micraelius, I, c. 10, §§9–16 and qu. 1–5, pp. 108sqq (where there is also an argument for the right of resistance in case of necessity), Felwinger, *De maj* §§278qq , von Seckendorf, *Fürstenstaat*, II, c 4, c 7, §12, III, c. 3, no. 8, Möser, *Patriot. Phant* IV, no 51 The same tendency appears in many of the exponents of positive constitutional law

46 Seckendorf, for example, qualifies the idea of sovereignty (though he describes it as a 'supreme and final power of command for the preservation and maintenance of the common advantage and existence') in two ways—by insisting strongly on the responsibility which attaches to sovereignty in

virtue of its being an office (*Furstenstaat*, II, c 1, *Christenstaat*, II, cc 6–7), and by rejecting entirely the notion that the sovereign is exempt from positive law (*Furstenstaat*, II, c 4, §2)

Fénelon's qualification of sovereignty

Fénelon, too, though he believes in the necessity of an *autorité souveraine*, which creates the body politic by giving it unity, and brings about a pooling of powers (*multiplication des forces*) in that body, and though he adds that this authority must necessarily be 'absolute' (c V), none the less protests against any identification of such a final and supreme authority of the last instance with mere arbitrary and unlimited power (c XI), and he therefore attacks *despotisme des Souverains* as well as that *de la populace*, while he eulogises a monarchy qualified and moderated by the rights of the people (c. XV)—notwithstanding the fact that he refuses to recognise any original sovereignty of the people or any right of resistance (cc VI and X). [For the view of sovereignty as an 'authority of the last instance' cf Loyseau, *Traité des Seigneuries*, II, §6 *la Souveraineté est le comble et la période de la puissance où il faut que l'Estat s'arreste et establisse*. Loyseau, writing about 1610, was a natural authority for Fénelon, writing towards the end of the seventeenth century We may also note (1) that Loyseau made a distinction between sovereignty *in abstracto*, which was a *property* inherent in and attached to the State and sovereignty *in concreto*, which was the *exercise* or enjoyment of that property by a person or body of persons (though he proceeds to confuse this distinction by arguing that a king 'may acquire by prescription a property in sovereign power, and thus add property in it to exercise of it', *Traité des Offices*, II, c 2, §§25–6), and (2) that it was a tradition of the French lawyers, from Bodin onwards, that even if 'majesty' were a 'supreme power. exempt from laws', this only meant exemption from positive laws of the ordinary sort, and majesty was none the less subject (*a*) to 'fundamental laws' such as the Salic Law ('which are connected with majesty itself', Bodin, *De rep* I, 88), and (*b*) to the *lex divina*, the *lex naturae* and the *lex omnium gentium communis* (ibid 84)]

[Compare Loyseau's views]

47 Cf supra, p 137

Leibniz's theory of sovereignty as relative

48 Cf Leibniz (*Caesar -Furst*, *Praef* pp. 329sqq, cc 10–12 and 26–33) on the degrees of *majestas*, *supremitas* and *superioritas*, on the possible discrepancy between the internal and the external position of the sovereign, and on the possibility of division and distribution of political authority We may note especially (c 11, p 360) the defence of these views against Hobbes and other writers they are very ready, Leibniz writes, to produce a *monstrum*, but their conception of sovereignty is only in place in *ea Republica cujus Rex Deus est* [i e in a State where omnipotence really exists], it does not apply to any civilised State, or even to Turkey, and it contradicts human nature We may therefore say that Leibniz believes that the *supremitas* of the Prince is not destroyed by the existence of a contract guaranteeing rights to the people or the Estates, or even by the presence of a *lex commissoria* [which delegates *imperium* to be exercised as a fiduciary power derived from the community], cf c 33

49 Thus we find Titius, Treuer and Hert censuring Pufendorf for adopting Hobbes' identification of the *Imperans* and the *Civitas*, and similarly we find the first two of these, along with Otto, blaming him for not introducing 'fundamental laws' as limits upon the representation of the State's will by the will of the Ruler (*Comm.* on II, c 6, §§10–11 of the *De off. hom. et civ*, Titius, *Observ.* 159, 557).

People and Ruler as both personae

50 Hert, it is true, makes 'the person of the State' reside entirely in the *summus imperans*, but he holds none the less that a *persona et corpus* may be attributed to the people, *quatenus primo pacto continetur* [i e. so far as it is constituted a 'person' and a 'body' by the original contract]. As a collective person, which comes into existence by virtue of the original contract of society, the people has *nihil commune cum imperio* [i e it is not a 'Subject' or owner of rights in anything like the same way as the Ruler], but it may acquire rights afterwards by contract or by prescription. Again the *populus conjunctus pacto primo* continues to survive even when the *pactum secundum* [i e the contract of government or subjection] is dissolved, and it has in that case to re-constitute the *pactum secundum* afresh. cf *Opusc.* I, 1, pp 288, 291, 295–8.

Schmier regards the *summa potestas* as the soul of the State, and he makes the 'Subject' or owner of this power 'the person of the State' (II, c 1, s 1, §§1–3) But he also holds that the *populus collective sumptus* continues to possess a status of its own as against the Ruler. It was the original 'Subject' of sovereignty (II, c 1, s 3), sovereignty reverts to it *vacante imperio* (II, c. 3, s. 1, §1, c 4, s. 2, §3, V, c. 2, nos. 65–9), it is at all times a *universitas* capable of possessing rights (V, c 2, s 1, s 2, §3, c 3, s 2, §§2–3) [He proceeds to classify those rights] (1) Like individual *subditi*, the community in general enjoys everywhere certain *reserved* rights (II, c 4, s 1, §1, V, c. 2, s 1) more especially, no change of the succession, and no alienation or mortgage of any of the rights of sovereignty, can have any validity in a 'non-patrimonial' State without the consent of the people (II, c 2, s 1, §§2–3 and s 2, §3) (2) The people may also *acquire* extensive rights in virtue of contracts or *leges fundamentales* (II, c 4, s 1, §2, V, c. 2, s 1, nos 6 and 8)—such as, for example, the right of giving its assent to laws (III, c 2, nos 28–30), and it may similarly acquire rights by prescription (II, c. 2, s 3, §2, nos 174–200). The *summa potestas* may thus be either 'absolute' or 'limited' [according to the degree of these popular rights] Yet even where it is limited, it still remains *intacta*, although there may be certain acts of the Sovereign which have no validity without the consent of the People or the Estates, and even although a *lex commissoria* may be imposed upon him (II, c 1, s 2, §2) The community has no right—at any rate in cases where it is not the real and true sovereign itself—to resist or depose the Ruler who has broken his contract, unless it be by way of self-defence against a Ruler who has become *hostis apertus* (II, c 4, s 2, §2, V, c 2, s 1 and c. 3, s 1). [The rights assigned to the people in the first part of this argument would thus appear to be denied in the second part]

Heineccius, while emphasising the exclusive representation of the State by the Ruler, and insisting on the unity and indivisibility of sovereignty, yet recognises the people as possessing the collective personality of a *societas aequalis*, and he also admits that, besides the popular rights which are everywhere established, in all forms of State, there may also exist additional popular rights in virtue of special constitutional provisions to that effect (*Elem* II, §§129–149, *Prael academ* I, c 3, §8 cf note 32 supra)

51. *Instit* §§979–89. *Jus nat* VIII, §§29–36.

52 *Instit.* §989, *Jus nat.* VIII, §§37sqq Even the representation of the people by the Ruler in the sphere of external relations, Wolff adds, is merely a matter of presumption, but when any different arrangement has been established by fundamental laws, that arrangement is effective only if, and so far as, it is known to other peoples (*Instit.* §994).

Wolff's view of popular rights

53. On Wolff's distinction between *imperium absolutum* and *limitatum*, see his *Jus nat* VIII, §§66sqq. and *Instit* §983, and on the application of this distinction to various forms of the State, *Jus nat* loc. cit §§131sqq and *Instit* §§990sqq In dealing with the nature of *leges fundamentales* Wolff views them as contracts, which it is beyond the legislative competence of the Ruler to modify, but which may be altered by the people, provided that they are not entirely based on an act of voluntary self-limitation by an otherwise unlimited Ruler, and provided also that such alteration does not affect adversely the acquired rights of the Ruler or his successors (*Jus nat.* loc cit §§77sqq., and *Instit* §§984, 989, 1007, 1043) The people, in his view, has a duty of unconditional obedience, even where there is abuse of the *summum imperium*, and he regards as inadmissible any proviso which makes the duty of obedience cease in a case of bad government On the other hand, he constantly insists on the right of passive resistance, whenever any order is issued which contravenes the commands or the prohibitions of Natural Law, or whenever, in a constitutional State, the limits of the fundamental laws are violated He even regards the people as a whole, or the injured part thereof, as entitled to offer active resistance whenever an attack is made on the rights reserved to the people—on the ground that in such a case there is a reversion to the state of nature, and each must therefore protect his rights for himself (*Jus nat* loc cit §§1041–7, *Instit* §§985, 1079, *Polit* §433)

54. *Syst nat* §1132 *potestas civilis est originaliter penes omnes cives simul sumptos, a quorum arbitrio dependet an, quomodo, et in quem eam transferre velint* it is only where the foundation of the State has proceeded from some third party [distinct from both people and government] that the position is different

Nettelbladt on popular rights

55 Loc cit §§1133sqq., 1153sqq There is indeed (Nettelbladt argues) a presumption against any limitation of the Ruler by the recognition of *jura popularia* to share in the exercise of *potestas civilis*, and [still more] against any limitation of his rights by the admission of the people to the status of joint-holders of supreme authority, but there is equally a presumption in favour of a view of monarchy as merely 'usufructuary', under a system in which *jura potestatis* are vested entirely in the *princeps*, but the *jura circa potestatem* reside as entirely in the people (§§1198–9) In all forms of State the civil power is subject, by the nature of the case, to *limites* and *officia*, and the *Respublica* therefore confronts the *Superior* as a 'Subject' or owner of rights (§§1127, 1134) In the event of an open transgression of *limites*, the people has the right of revolt (§1270) The conception of sovereignty is so much attenuated in the theory of Nettelbladt that he makes mere *potestas civilis* (*die Hoheit im Staat*) the criterion of the State, and even holds that the *summa potestas* (*la souveraineté*) may be *subordinata* thereto (§§1125–9) [If *summa potestas* can thus be 'subordinate' to *civilis potestas*, the sovereignty which is indicated by it cannot be more than the 'courtesy' title of sovereign, as when we speak of 'our sovereign Lord the King'. It is not a true *summa potestas* in the legal sense—the authority of the last instance, which finally decides]

56. Loc. cit §1200· the *princeps*, as a 'public person', is a person in the state of nature, who is one with his people (*una persona cum populo*) in the sphere of external relations.

Nettelbladt on the People as a moral person

57. In a monarchy the *populus* is always a *persona moralis* distinct from the king; but in its character of a moral person the people varies—sometimes

being altogether *subditus*, sometimes retaining reserved powers, and therefore [and to that extent] remaining *in statu naturali*, sometimes possessing political authority jointly with the prince, and therefore living, along with him, in the state of nature (§ 1201). The same position also exists in an aristocracy, as between the *populus* and the *collegium optimatum* (§ 1217) In a democracy, on the other hand, the Senate is a *persona moralis subdita populo, non in statu naturali vivens* (§ 1220), as also are all the magistrates (§§ 1226sqq.)

On the Estates as a moral person

58. Loc cit §§ 1210–12 The Estates exercise the rights of the people 'in their name' (whether these rights be merely the general rights *circa potestatem*, or particular rights of exercising authority [apart from the prince], or rights of sovereignty* shared with the prince), and therefore they 'represent the people, and have its rights'. We have thus three separate 'Subjects' or owners of rights [the Ruler, the People, and the assembly of the Estates] who may all live in a state of nature, for the 'body of the Estates', in so far as it exercises rights of sovereignty in the name of the people, is also free from subjection [and therefore in a state of nature].

59. *Naturrecht*, pp. 240, 244, 246, 292sqq , 308sqq , 317

60 Loc cit p. 310

Daries on sovereignty and its limits

61. Daries holds that the essence of the State requires an *imperium summum* and an *imperans* (§§655sqq) The content of majesty is always the same (§§667sqq.) the 'Subject' of majesty may be either a collective person or an *individuum* (§§747sqq.) But there are *limites majestatis*—both the natural, which are to be found in all forms of State, and the *pacitii*, which are found in constitutional States in addition to the natural (§§780sqq) Limited monarchy, where the people has only given a *consensus conditionatus*, and where the Ruler is bound by *leges fundamentales vel capitulationes*, is none the less monarchy, and the erection of *ordines imperii* with powers of supervision, or even the presence of a *pactum commissorum* [a *Wahlkapitulation*, pledging the monarch at the time of his election?], does not turn it into a mixed form of State (§§786–9)

Achenwall on constitutional types of State

62 Achenwall regards all *civitates ordinatae* as based on *pacta fundamentalia*, which cannot be altered by unilateral action (II, § 109) By the principles of 'universal absolute public law', the contract of government issues in an *imperium summum plenum et illimitatum*, either of the 'people', or of a 'physical person', or of a 'moral person' (§§ 112sqq), but by 'universal conditional public law'† the *imperium* may be limited by 'fundamental laws', and we thus find, by the side of absolute monarchy, *monarchia minus plena* and *monarchia limitata*—the monarch, in the latter of these two varieties, being obliged to act by the consent of the people, and the people possessing either a *corregimen de facto* or a formal *co-imperium* (§§ 148sqq.)

Scheidemantel on the limits of majesty

63 Scheidemantel holds that every State requires 'a common Head', who represents the 'majesty' of the State, and is either the whole society, or some of its members, or one (I, pp 38sqq) Majesty, as 'the highest form of existence in the State', is not subject to any laws, but may be bound by divine commands and by the fundamental laws which it has accepted for itself by contract (I, p 116)

* Strictly speaking, the word *Hoheit* (which is here translated as sovereignty) means something different from sovereignty in Nettelbladt, being identified with *civilis potestas* and distinguished from *la souveraineté* (n 55 supra, *ad finem*) But it is difficult to render the word otherwise

† For these elaborate classifications of *jus*, see p. 291

Schlözer's constitutionalist theory

64. A. L von Schlozer treats the relation of the Ruler and the People as entirely a contractual relation (pp 95sqq), which should ideally be defined in a fundamental contract made under oath (p 102, §6), but he allows the Ruler the right to denounce the contract at any time, and he gives the People the right of denouncing it under given conditions (p 108, § 10) Though he rejects the theory that 'law should be the one and only Ruler', and though he emphasises strongly the necessity of a 'Sovereign' or 'Ruler' who constitutes the common will, and represents the State, either as an '*individuum*' or as '*unum morale* feigned by a majority' (pp 77–9, 95, 100), he none the less imposes fixed limits upon the power of this sovereign in the course of his argument (cf p 94, § 1)—contending that he is bound by positive as well as by natural law (p 96, §2, p. 101, §6), and that he is subject to the fundamental contract (p. 102).

Theories of resistance

65 Daries, e g , regards the withholding of justice as causing a return to the state of nature (§733) Achenwall allows individuals only the right to emigrate, when the fundamental contract is broken; but he allows a *universitas*, or an *insignis pars populi*, the right to resist by force of arms and expel the tyrant, if the danger threatened by acquiescence in wrong is greater than the disadvantages of rebellion, §§200–7 [cf Bentham's *Fragment of Government*, where resistance is held to be 'allowable to, if not incumbent on, every man when the probable mischiefs of resistance (speaking with respect to the community in general) appear less to him than the probable mischiefs of submission' (c IV, §XXI), cf also Palcy's *Moral and Political Philosophy* (Book VI, c. III)—'the justice of resistance is reduced to a computation of the quantity of the danger and grievance on the one side, and of the probability and expense of redressing it on the other']

Scheidemantel thinks the nation entitled, if there be real tyranny, to rise in forcible resistance, on the ground that the bond between the prince and the nation is broken by abuse of the power of the State and transgression of the limits of that power, and that the nation thus returns to the liberty and equality of the state of nature (III, pp. 364–75)

Schlözer allows a *droit de résistance* if there be evident tyranny, along with a power of enforcing that right by coercion, deposition or punishment, 'all being in accordance with the notion of a contract in general'. But he does not think the individual justified in exercising, or the masses capable of using, this right 'woe, therefore, to the State where there are no representatives, and happy Germany—the only land in the world where a man can take action against his ruler, without prejudice to his dignity, by due process of law, and before an external tribunal' (pp 105–7) [Schlozer, writing in 1793, is thinking of the *Reichskammergericht* at Wetzlar, dissolved, along with the *Reich* itself, in 1806]

The reader is also referred to the author's work on Althusius, p 315 n 128

Sidney on parliaments

66 *Discourses*, III, sect 44 The power of parliament is 'essentially and radically in the people, from whom their delegates and representatives have all that they have'. In England, however, unlike Switzerland and the Netherlands, the several counties and towns are not separate sovereign bodies, but only 'members of that great body which comprehends the whole nation', and therefore the representatives do not serve the bodies by which they are elected, but the whole nation If these representatives could assemble of themselves [i e. without a royal summons—a summons which, at the time when Sidney was writing (1680–3), Charles II steadily refused to

issue], they would be responsible to the nation, and the nation only when it is impossible for them to assemble, they have only a responsibility to their consciences and to public opinion But this great power of the representatives, instead of diminishing liberty, really maintains it It is identical, at bottom, with the power of the electorate The people still remains sovereign, because only the possessor of an unlimited right can give an unlimited power of representation The reason for the people giving such power, instead of imposing 'instructions' or mandates, is simply a prudent self-restraint [Sidney's argument, in favour of true 'national' representation and against 'instructions', is a harbinger of Burke's famous speech to the Bristol electors in 1774 (*Works*, in Bohn's edition, vol I, p. 447, cf a similar passage in his *Reflections*, vol II, p. 457) Mr Norton, a member of one of Elizabeth's parliaments, had already argued in 1571 that in parliamentary representation 'the whole body of the realm, and the service of the same, was rather to be respected than any private regard of place or person' (Hallam, *Con. Hist.* I, c v, p. 267)]

67 *Discourses*, II, sects 7, 32 (on solemn, sworn and binding contracts between the magistrates and the nation)

Sidney on the People

68 The People, Sidney argues, is the source of all authority (I, s 20), it creates authority (II, s 6), and it determines its limits (II, ss. 7, 30–33), it necessarily retains legislative power, even in a monarchy (III, ss 13–14, 45–6), and it continues to be a judge above all the magistrates (III, s 41) The ruler is an officer appointed by and responsible to the people (II, s 3, III, ss 1 sqq) no obedience is due to his commands if they are unjust (III, ss 11, 20) resistance is permissible, if he abuses his office (III, ss 4 sqq), and he may even be deposed (III, s. 41, cf s. 36—'the general revolt of a nation cannot be called a rebellion'), the people too [as well as parliament] thus retains the right of free assembly (III, ss 31, 38)

Locke on the rights of the People

69 Cf Locke's *Second Treatise*, II, c 10, §132, cc 13–14 The people (or 'the community') continues to be the fountain of all powers, and retains a right of reversion therein (II, c 11, §141, c 19, §§220 and 243), but its 'supreme power' only expresses itself in the event of the dissolution or forfeiture of authority (II, c 13, §149), and the legislative power is sovereign 'whilst the government subsists' (II, c 13, §150) [Locke goes further than Gierke allows in his view of the rights of the People In c 10, §132, anticipating Rousseau, he argues that 'the majority, having the whole power of the community naturally in them, may employ all that power in making laws for the community from time to time, and executing those laws by officers of their own appointing, and then the form of government is a perfect democracy' Normally, we must admit, Locke regards the people as delegating its power to a 'legislative', rather than as making laws itself Even so, as we have already had reason to notice (supra, n 68 to § 16), he does not speak of a contract between people and legislative, but of a unilateral act of the people vesting a trustee or 'fiduciary' power in the legislative It follows upon this view that, while this fiduciary legislative may be called 'supreme', or even 'the one supreme power', the people is always a supersovereign, having another and higher 'supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them' Thus the people comes into action, *not* in the presumably rare event of a breach of contract, but in the presumably more frequent event of 'action contrary to the trust'. For such an event, to judge from the analogy of the

treatment of the trustee in English *Privatrecht*, may be confidently expected by the trustor who is also the beneficiary of the trust—all the more as he is in addition (in Locke's theory of the political trust) the judge of its execution]

Locke on the People as sovereign judge

70. The people is the sovereign judge which decides whether the powers appointed by it, including the legislative power, observe their limits If a formal organisation of its rights is lacking, it can appeal to Heaven if it has once removed the powers which have forfeited their authority, it can either content itself by simply placing authority in fresh hands, or erect an entirely new constitution [Locke actually says, in c 10, § 132, where he is speaking of legislative power which has been given for lives, or for any limited time, that upon reversion 'the community may dispose of it again anew into what hands they please, *and so* (not '*or*') constitute a new form of government' (The references which Gierke gives are to c 19, esp §§212, 220, 242–3, and to c 18, §§199–210, but they do not support his account of Locke's views) Nor does Gierke's phrase about the people 'appealing to Heaven if a formal organisation of its rights is lacking' correspond to what Locke actually says (c 19, § 242) There is nothing in Locke about absence of formal organisation of rights for him the community is 'presently incorporate' by the original contract of society, continues to remain in that condition, and is thus formally organised for vindicating its rights Again, the 'appeal to Heaven' means something more definite, and more legal, than Gierke's brief quotation suggests Locke is arguing that if a controversy arises between the prince and some of the people on a matter on which law is silent or doubtful, the proper umpire is the body of the people, who have given him his power as a trust and can therefore decide upon his use or abuse of that power If the prince, however, declines that way of determination, 'the appeal then lies nowhere but to Heaven'—i e the case is carried in the last resort to the divine ordeal of battle in civil war]

71 Cf supra, p 108

72 *Contr soc* II, cc 1–2, 7, III, cc 15–16, cf supra, p 112

Rousseau on sovereignty

73 On sovereignty as inalienable, see *Contr Soc* II, c 1 Sovereignty, being nothing but the exercise of the general will, is inalienable A contract of subjection [*pacte de gouvernement*] would mean the dissolution of the people —*il perd sa qualité de peuple* Will simply cannot be 'transferred' the sovereign may say, 'I do will what such and such a person wills', but not, 'I shall will whatever such and such a person may will to-morrow'

On the indivisibility of sovereignty, see II, cc 6–7 The people is the only legislator it needs to be instructed by an enlightened law-giver, because it is not always able to see the good which it always wills, but the law-giver has only the office of proposing and drafting—*le peuple même ne peut, quand il le voudrait, se dépouiller de ce droit incommunicable*

On sovereignty as illimitable, cf III, c 16 A contract between people and king is inconceivable sovereignty is illimitable as well as inalienable *la limiter c'est la détruire il n'y a qu'un contrat dans l'état, c'est celui d'association, et celui-ci seul exclut tout autre, on ne saurait imaginer aucun contrat public, qui ne fût une violation du premier*

On the impossibility of representation, see III, c 15

On Government

74 Government is a commission *un emploi dans lequel, simples officiers du Souverain, ils exercent dans son nom le pouvoir dont il les a faits dépositaires, et qu'il peut limiter, modifier ou reprendre quand il lui plaît, l'aliénation d'un tel droit étant incompatible avec la nature du corps social et contraire au bout de l'association* (III, c 1).

The 'institution of the government' is not a contract, but a twofold act—the passing of a law in regard to the future form of administration, and the putting of this law into effect The fact that the political body can thus achieve an administrative act [i e the act of putting the law into effect] before the existence of an administration is explained by this body's astonishing conjunction of apparently contradictory properties [or, as Rousseau puts it, 'by one of those astonishing properties by which it is able to unite operations which seem to be contradictory'] it executes its own law *par une conversion subite de Souveraineté en Démocratie*—that is to say, by simply instituting *une nouvelle relation de tous à tous* [in which, for the nonce, the citizens become magistrates], as when the English House of Commons turns itself into a committee of the whole House (III, c 17)

75 *Contr soc* III, cc 11–14, 18, cf supra, n 209 to § 16

On the provisional character of the constitution

76 Ibid III, c 14 *à l'instant que le Peuple est légitimement assemblé en Corps Souverain, toute jurisdiction du Gouvernement cesse, la puissance exécutive est suspendue et la personne du dernier Citoyen est aussi sacrée et inviolable que celle du premier Magistrat, parce qu'où se trouve le Représenté, il n'y a plus du Representant* Cf also III, c. 18 every constitution is only provisional, and all offices are revocable regular assemblies are required, each of which must open with the putting of two questions (1) *s'il plaît au Souverain de conserver la présente forme du Gouvernement?* (2) *s'il plaît au Peuple d'en laisser l'administration à ceux qui en sont actuellement chargés?*

77 *Contr soc* I, cc 6–7, II, cc. 2, 4

The dualism implicit in Rousseau's theory

78 Ibid III, cc 1–6, 16–17, supra, nn 213 and 214 to § 16 Rousseau, of course, is not blind to the contradiction between his own theory and the actual facts of contemporary constitutional law, but he treats all existing conditions as illegal, and without any binding force According to his theory the moment at which this second moral person [that of the *Gouvernement*] assumes the independent ruling authority which it is capable of exercising, and tends to exercise, marks the violation of the *traité social*, the dissolution of *le grand État*, and the constitution of a new State, composed of the governors only, and excluding the citizens, who thus revert to the liberty of the state of nature, and are not obliged, though they may perhaps be compelled, to render obedience (III, c 10)

Sieyès' modification of Rousseau's views

79. In the theory of Sieyès, for example, the person of the State is simply the community of associated individuals (cf n 117 to § 16), and this community, in virtue of its inalienable and illimitable sovereignty, cannot be bound either by a fundamental constitution or by law on the contrary, it can abolish all positive law whenever it wishes, in the strength of the community-will which is the final source and supreme controller of such law, and it can create new law by the simple expression of such will (I, pp 131–6, 143, 202sqq) But this omnipotence of the collective sovereign only appears in action when the nation uses its supreme right in a controversy about the basic constitution, and proceeds to form a constituent assembly by appointing extraordinary and plenipotentiary representatives (I, pp. 138–42) On the other hand, even in ordinary times, when there is no such assembly in session, the law which the nation itself has enacted controls the *corps constitués*, including the legislative no less than the executive, as a universally binding constitutional norm (I, pp. 127–37, II, pp. 363sqq , cf also nn. 118 and 119 to § 16, supra) Cf. also Filangieri, I, cc. 1, II, VII, c. 53.

Fichte on the rule of law

80 Fichte lays considerable emphasis on the rule of law In order to secure it, he postulates a government which, though it is responsible to the sovereign people, has its own independent basis, and he rejects as 'illegal' forms both democracy proper, in which the community is judge and plaintiff at the same time, and despotisms in which the government is irresponsible (*Works*, III, pp 12sqq , 150sqq)

81 *Works*, III, pp 150sqq , 160–3, 286sqq.

82. Ibid III, pp. 15sqq , 163, 166sqq

83. Ibid III, p 169 So long as the appointed ruling authority lasts, its will is the common will, and any other will is a private will

84 Ibid III, p 170

85 Ibid III, pp 171sqq

Fichte on meetings of the community

86 Ibid. III, p 173 Fichte is not thinking here of a single large popular assembly, but of assemblies in different places, which must, however, be 'really great masses' Such 'great masses' are necessary, in order that the force of the people may be unquestionably superior to that of executive officers (p 177)

On popular resistance

87 Ibid III, pp 182sqq The people is never a rebel, for what is greater than the people? Only God The leaders of popular movements are presumptively rebels, but the presumption is cancelled as soon as the people follows them, and thus declares them to be in agreement with the real general will See, to the same effect Fichte's *Sittenlehre* (of 1798), in *Works*, IV, pp 238sqq

On the contract of devolution

88 Fichte speaks expressly of a 'contract of devolution', arguing that in the making of that contract the magistrates negotiate with the people as a 'party' to it, and are excluded from membership of the people in perpetuity by accepting its terms Once they have accepted these terms, and made themselves responsible, they can neither resign their office, nor be deprived of it, except by the common consent of both parties, and they must be given a free sphere of action in promoting the general good (*Works*, III, pp 163–5, 175-7)

89. *Works*, III, p. 176

On the magistrates and the community

90 Once the assembled people re-enters upon its sovereignty, as 'the Community', the magistrates become merely a 'party' the ephors appear as accusers, and the executive officers as defendants condemnation involves the penalties of high treason and perpetual banishment, but acquittal restores the person or persons acquitted to the position of 'magistrate' (*Works*, III, pp 174sqq)

Fichte's later philosophy

91 In his lectures on *Die Grundzuge des gegenwartigen Zeitalters* (1804–5), Fichte detaches the State from its individual members (cf n 66 to § 16) It is now described as 'a notion invisible in its essence' it is 'not individuals, but their continuous relation towards one another—a relation of which the living and moving author is the activity of individuals, as they exist in space' again it is 'the result' which emerges from the union of the leadership of the governors with the strength of the governed when they follow that leadership (*Works*, VII, pp. 146–8). In his *Rechtslehre* also [1812] he adopts throughout an impersonal view of the State, ascribing sovereignty to 'the emergent will for law and right' which is manifested in the Ruler (*Posthumous Works*, II, p 629, cf *Works*, VIII, p 157). A similar view appears in the *Staatslehre* [1813], where supreme authority is vindicated 'for the highest human reason of a given age and nation' (*Works*, IV, pp. 444sqq.).

92 *Esprit des lois*, XI, c 6 legislative power inherently belongs to *le Peuple en corps comme dans un État libre tout homme qui est censé avoir une âme libre doit être gouverné par lui-même*

Montesquieu avoids the problem of sovereignty

93. In dealing with the theory of separation of powers (XI, c 6), Montesquieu avoids entirely any treatment of the problem of sovereignty In dealing with the classification of States, he speaks of the *souveraine puissance* of the *Peuple en corps* in democracies (II, c. 2), but so far as other forms of State are concerned he only speaks of 'government' by a minority or a single person (II, cc 3–5)—though he occasionally describes a king as *Souverain* (e g VI, c 5) He never makes any reference whatever to the personality of the State the issue to which his attention is always directed is whether the three *sortes de Pouvoir* should be united in a single man or body of men, or divided between several

Frederick the Great and the People

94 Frederick the Great indubitably comes very near to a theoretical recognition of the sovereignty of the people Not only does he refer the origin of all ruling authority to a contractual act of devolution by the people he also identifies 'People' and 'State', in contradistinction to the Ruler appointed in virtue of that contractual act, and his famous saying that the Prince is *le premier serviteur de l'État* also reappears in his writings in the form that he is *le premier domestique des peuples qui sont sous sa domination* (*Antimach* c 1, *Oeuvres*, I, p 123, VIII, pp 25sqq , IX, pp 196–7) [Gierke naturally seeks to cite the great authority of Frederick the Great But it is not clear that Frederick was doing anything except to repeat, in a literary exercise, the current maxims of the Age of Enlightenment, nor is it certain whether, in identifying People and State, he meant (1) that the State is only the People, or (2) that the People is only the State—two seemingly identical propositions which are none the less very different] The reader is also referred to the expressions of the constitutionalist theory in Voltaire, de Mably, Blackstone, de Lolme, etc , cf the author's work on Althusius, p 187 n 186

Justi on popular rights

95. Justi regards the State as a single moral body, with a joint force and a single will (*Natur und Wesen*, §28). In this body, it is 'the basic authority of the people' which is the source of all other authority and is constantly appearing in action itself—determining the fundamental laws of the State, and limiting and binding the ruling authority which it confers (§46) Only the 'use' of the common possessions and powers is devolved upon the Ruler the *dominium eminens* (*Obereigentum*) in respect of them all remains with 'the People', or 'the whole State', of which the Ruler is the 'Representative' (§49). The bearer of ruling authority cannot, therefore, use his authority for purposes repugnant to its final cause, or damage its substance (§50), and if he attempts to do so, the people may revoke the commission which it gave (§47) If the Ruler cannot fulfil his commission, or if he violates the fundamental contract, his rights disappear (§§141–2, 146, 161) He must always 'have in view the united will of the people' (§§149–50) the basic authority of the people affords a presumption in favour of 'a limited ruling authority' (§57), but even where the Ruler is unlimited this basic authority of the people still remains in force (§§67, 74) See also Justi's *Grundrisz*, §§9, 11, 15, 17, 23sqq , 29sqq

Dualism of People and Ruler in his theory

96 The 'supreme active authority', once it has been appointed, is independent, and not subject to the judicial cognisance of the people, because the people is *pactscens* [i e. a party to a contract in which it has stipulated certain conditions in its own favour] and cannot be judge in its own case

(*Natur und Wesen*, §67) While the supreme authority observes the limits of the fundamental laws, it has the use of the whole power of the body politic, and thereby also of the powers and possessions of its individual members (§§45, 48) the Ruler and the People are the two main parts of this body, connected together by the closest of ties, which can only be broken by a definite breach of contract (§§128, 130–42)

97. *Natur und Wesen*, §§93sqq , 130–42

98 The people is the source of all authority, and moreover, in the rational and only lawful and definitive State (which Kant calls the *Republik*), it is also the 'Sovereign', inasmuch as true sovereignty or ruling authority belongs to the legislative, and the agreed will of the people should be the legislative (*Works*, VI, pp 227sqq , VII, pp 131sqq , §§45–6) The associated people itself thus emerges, by virtue of the political contract by which it is constituted, as 'the universal Head' (VII, p 133, §47) The *Regent* (*rex* or *princeps*), as being the moral or physical person entrusted with executive authority, is to be regarded as the 'agent' of the people, or 'the organ of the Ruler' [i e of the true Ruler—the people itself] He is 'subject to the rule of law, and bound thereby, and therefore he is bound by another than himself, that is to say, by the Sovereign', who can 'take away his authority, depose him, or reform his administration' (VII, pp 134–5, §49, p 137, VI, pp 332, 336) Similarly the people is the fountain of justice—though it has to exercise the right of judicial decision indirectly, through representatives chosen from and by itself (the Jury),* and, further, to leave execution to the courts of justice (VII, p 135) Being 'the most personal of all forms of Right', the sovereignty of the People is inalienable any contract, by which the people pledges itself to return the sovereignty it has once attained [by concluding the original political contract, which *ipso facto* constituted the political body so created sovereign over itself], is 'inherently null and void', and if any man exercises the power of sovereignty as a legislator, 'he can only have control over the people through the common will of the people, but he cannot have control over the common will itself' (VII, p 159, §54) *Kant's theory of popular rights*

99 Cf *Works*, VI, pp 329–30 'an idea of the reason—that is to say, an idea such as to oblige every ruler, in enacting law, to enact it *as though* it could have proceeded from the will of the whole people, and, again, to oblige every subject, so far forth as he wishes to be a real citizen, to regard the law *as though* he had concurred in the will enacting it in the manner aforesaid this is the touchstone of the rightfulness of all public law' cf also VII, p 158 [We may almost say that Kant's philosophy is a philosophy of the *as though* (*als ob*), in the sense that when a thing is done 'as though' it were another thing (e g when law is enacted by somebody other than the people 'as though' it were enacted by the people), it becomes that other thing The real difficulty which Kant is facing is whether a law for the general good can be enacted otherwise than by the general will He answers that it can be— *Kant's theory of the* as though

* Kant's view appears to go beyond English practice, where the jury finds the facts on which the judicial decision is based His distinction between the *Rechtsprechung* of the jury and the *Ausführung* by the *Gerichtshof* corresponds to old Teutonic ideas and practices, in which the people assembled in a folk-moot judge, and a judicial officer (such as the sheriff) executes the judgment, but it does not correspond to the relations between judge and jury in England, where the jury is in no way analogous to a folk-moot, but is derived from a royal prerogatival method of 'inquisition' into the facts, through 'sworn' representatives of local knowledge and opinion picked by royal officials, leading to a decision given by a royal judge.

provided that the enactor enacts 'as though' he were the general will We might rejoin that no man or body of men other than the general will can act as the general will acts—i e can have gone through the dialectical process of social discussion, and taken the broad general social view, which a whole society can go through and take]

Kant not a democrat in practice

100 The people cannot 'ratiocinate effectively' about the origin of the supreme authority to which it is subject, and it must 'obey the *de facto* legislative authority, be its origin what it may' It 'cannot, and must not, judge otherwise than as the Head of the State for the time being (*summus imperans*) may will' The Head of the State alone is exempt from all coercive law he is 'not a member, but the author and sustainer of the commonwealth', the one and only 'gracious sovereign Lord' in the State, and although there are norms or standards which the Ruler should observe in enacting laws, any and every law is binding on his subjects It follows that the people can never enjoy a right of resisting the powers that be (it cannot even plead that right in case of necessity), or possess any authority to coerce or punish the Head of the State, nor can any constitutional provision be conceived, or admitted, by which a 'publicly constituted opposition' can be invoked to protect the rights of the people against the Head of the State in the event of his violation of the constitution, since any such authority would itself be the Head of the State, or would postulate the existence of a third Head of the State [to judge between it and the *summus imperans*] True, there are 'indestructible rights of the people as against the Head of the State', but the only protection of such rights is 'liberty of the pen, the one palladium of popular rights' See *Works*, VI, pp 323, 326 and 330–7, 449–50, VII, pp 136–41, 158sqq

On this basis Kant also rejects the possibility of any alteration of the constitution by the people, and contents himself by appealing to 'the powers that be' to observe the law of Reason which requires that they should realise a constitutional system of government and thus create the only rightful and abiding constitution, *Works*, VII, pp 157sqq

101 It is true that Kant believes that the 'associated people', in a constitutional State of this pattern, should not only represent the Sovereign [in the sense of representing the final and sovereign law of Reason], but should actually be sovereign itself, in the sense of exercising legislative authority through the deputies whom it elects, but since it cannot, in its capacity of legislative, enjoy any executive powers, or pronounce any judicial decision, the people is left completely impotent as against the other powers, *Works*, VI, pp 416–20, VII, pp 131–6, 159–60

102. Cf *Works*, VII, pp 158–9, §52 'this is the only permanent constitution of the State, in which law is self-governing and depends on no special person' Cf also pp 156 and 173

103 Cf nn 41 and 47 to §14

'Mixed' and 'limited' States

104. Thus Horn argues that there cannot be a *mixta Respublica*, because *majestas* is no more divisible or communicable than *intellectus Petri cani communicari potest* Any division of the rights of supreme authority means a complete confusion and destruction of *majestas* even in Poland (as was also the case in Scotland at an earlier date) the King is still the Sovereign, although his *modus habendi majestatem* is *limitatus* by the pact which obliges him to consult the *proceres*. *De civ* III, c un §3, and II, c 2, §8, c 10, §5, cf Becmann, c 24, §6

105. Cf Micraelius, I, c 13, §§3sqq there is a *forma mixta*, but it only exists in the sense of a *forma temperata*, and this designation is preferable Similarly Knichen, after giving an exhaustive account of the position of the controversy, arrives at the view that it is best to avoid the conception of a *forma mixta*, because the question is really one of *limitata* (rather than of *mixta*) *summa potestas* (*Opus pol* I, c 8, th 8, pp 318–22)

Fénelon also, while he rejects equally *despotisme des Souverains et de la Populace*, regards a *forma mixta* as impracticable, because it involves *partage de la Souveraineté* (c XII), and he describes, with an obvious prepossession in its favour, a system of *monarchie modérée par l'aristocratie*, in which the King needs the consent of an aristocratic chamber for legislation, and that of the people itself for the imposition of new taxes (c XV)

106 If this line was taken [i.e. if it was argued that limited sovereignty was inconceivable, and that States with constitutional limitations upon the rights of the Ruler were only 'mixed', and not pure, forms], the result, on the basis adopted by Bodin and Hobbes and other advocates of absolutism, was simply to demonstrate the non-existence of such States, for on their view the real sovereign must always be either one man, or a single aristocratic council, or the people itself as a single unit, and no constitutional limits were legally binding upon that sovereign

Arnisaeus, on the other hand, though he regards any limitation of sovereignty as inconceivable, admits the possibility of its division (cf n 47 to §14) Spinoza too sketches the ideal of a limited monarchy, although he considers absolute monarchy alone to be real monarchy (cf *Tract pol* cc 6–7, and supra, n 10 to § 17)

107 Pufendorf *Jus nat et gent* VII, cc 4, 5, §§12–15, c 6, §13, *De off hom. et civ* cc 7, 8, §12

108 Thomasius, *Instit jur div* III, c 6, §§32–3, 38–56, 59–61, 156–60

109. J H Boehmer, *Jus publ univ* I, c 3, §§25–6 the *mixtus status*, when it occurs, is in any case a *monstrum Reipublicae*, because it depends on a division of powers, and such division disturbs *unio*

110. Hert, *Elem.* I, 11, §8

111 Schmier, *Jus publ univ* I, c 4, nos 30–55 a genuine *forma mixta*, when it occurs, is necessarily *informis*, because *majestas* is indivisible [and to divide it therefore destroys the *forma Reipublicae* and makes it *informis*] All that is compatible with the essence of the State is (1) 'limitation' of majesty in regard to its *modus habendi* and (2) the participation of others in its *administratio*

112 Gundling, *Jus nat* c 37, §§21–36, *Disc* c 36 Any *respublica* is 'irregular', when the 'Subject' of majesty is several different persons, and not *una persona physica vel moralis*, and when majesty is therefore divided, and the State is without unity and a soul or spirit There is nothing, therefore, in a *respublica mixta*, and Sidney's view is a mere chimaera, but people may all the same live happily in such a State, *per accidens*, as they do in England, Germany and Poland Cf *Jus nat* c 38, §§19–23, where Gundling argues that the people may draw the sword in a 'limited and irregular form of State', in which *tuetur unusquisque jus suum ex pactis quaesitum*, but it is otherwise, he adds, in a regular form of State *Gundling on the mixed State*

113 Heineccius, *Elementa*, II, §138

114 Heincke, *Syst* I, c 3, §§24–5 (note the sharp distinction, in §26, between the mixed constitution and the *forma temperata*)

'Irregular' States

115 We find Hert, for example (loc cit), already developing [in his *Elementa* of 1689] a formal scheme of *respublicae irregulares* which includes five subdivisions—Despotisms, Patrimonial States, Vassal States, and Unions or Confederations, in addition to Mixed States Schmier (I, c 4, ss 1–3 of his *Jus publ univ* of 1722) distinguishes three kinds of irregular *civitates—ex defectu finis, ex defectu formae, ex defectu nexus* Cf also Gundling [in 1714], n 112 of this section.

116 Otto's *Commentaries* on Pufendorf, § 12 on *De off hom et civ* II, c 8

117 Titius, *Spec jur publ* VII, c 7, §§ 31–3 and 53–63 In the *civitas laxa*, we have to ascribe *majestas pluribus simplici saltem obligatione connexis divisim vel indivisim*, but even in such a case the State is one, and the 'Subject' of political authority is *unum, sed non satis unitum*

Theories of partnership in sovereignty

118 See Besold, *Diss de statu Reip mixto*, c 1 (where the phrase *communicata majestatica potestas* occurs), cf also the author's work on Althusius, pp 169 n 138, 181 n. 170, 355 nn. 77 and 78 In using the argument that the Emperor and the Estates of Germany were only *conjunctim* [and not severally or separately] the 'Subject' of a single and indivisible sovereignty, thinkers were especially concerned to rebut the attacks of Hippolithus a Lapide and Pufendorf on the prevalent theory, and to vindicate the constitution of the Empire from any taint of irregularity

119. Huber, *De jure civ* I, 3, c 1, §§ 21–3, c 5, §§ 24sqq , 79sqq , I, 8, c 6 Such communities [in which sovereignty is shared] may arise in consequence of the rights of majesty being either alienated or prescriptively acquired by one of the three parties concerned—prince, nobles and people, I, 3, c 89. While there is no possibility of applying legal coercion to a Sovereign, the application of such coercion to the *Imperans* is a conceivable thing when the people *in societatem imperii, saltem pro parte, receptus est*, I, 9, c. 5, § 49

120 For attempts to defend the mixed form of State by the doctrine of partnership in sovereignty see e g Cellarius, c 9, § 35 (*conjunctim sumpti*), Kestner, c 7, §§ 5 and 8 (*in solidum*), Alberti, c 14, § 11, H de Cocceji, *Prodromus* (a different view appears in S de Cocceji, § 624), Heineccius, II, § 126, and especially Scheidemantel (I, pp 156–62) Scheidemantel—agreeing with Pufendorf, Real, Mercier and Rousseau, as against Grotius, Arnisaeus, Piccartus, Montesquieu, Mably and Justi—attacks any division of the rights of majesty as an offence against the unity of the State, describing the appearance of such division as 'a disease', but he admits the possibility of a partnership in majesty, i e a participation of several 'Subjects' in the exercise of its rights

121. Thinkers, as a rule, were shy of treating in any detail this problem of the nature of the shares [possessed by the different 'Subjects' of majesty], contenting themselves with such phrases as were suitable for describing the legal position of ownership by *gesamte Hand* in German law [cf supra, p 185, n *] There were some who assumed, in respect of systems of joint majesty, a *condominium plurium in solidum* analogous to the *condominium* of private-law groups, cf Kestner, loc cit, and especially Vitriarius (I, 7, §§ 4–6), who speaks of a single Right with 'Subjects' who are 'diverse and mixed', parallel to the obligation of *correi debendi* [where there are multiple debtors, but a single 'Object' owed by them all, cf supra, p 123, n *] There were others who spoke of 'ideal' shares cf Besold, loc cit, and Frantzken, *Diss. de statu Reip. mixtae* (in Arumaeus, III, no. 27).

122 Thus we find Hulderic ab Eyben arguing—in his *De sede Majestatis Romano-Germanicae* (*Scripta*, III, no 5), c 1, §§31 sqq —that in a mixed form of State several 'Subjects' together form the 'common Subject' (*miscetur non majestas, sed subjectum*), but he proceeds to add that the *exercise* of supreme authority [i e the actual use of majesty, as distinct from majesty 'in itself' when regarded as an abstract power] may be either (1) divided among several users, or (2) managed on a joint system in some respects, but divided in others (§37)—the latter being the case in Germany, in so far as the authority of the territorial princes is really a case of the distribution of imperial sovereignty among different persons for separate use (c 3) [i e in Germany imperial sovereignty is in some respects managed on a joint system, in which the Emperor and the Estates are associated, but in other respects it is divided among territorial princes] *The 'shares' in the partnership*

123 Achenwall, II, §§186–7

124. Like Arnisaeus, Grotius, Limnaeus, and other thinkers of previous centuries, we find Clasen (II, c 9), Felwinger (*Diss de Rep mixta*, pp 417 sqq), and Boecler (II, c 2, III, cc. 1, 8), still maintaining the conception of a *forma mixta* with a real *divisio majestatis*

125. Thus Treuer, in commenting on Pufendorf, *De off hom et civ* II, c 7, §9, contends that *majestatis divisio* is generally possible and advantageous, and does not produce a *monstrum*, because *respublica perpetuum majestatis subjectum manet*

126 Leibniz (*Spec demonstr polit* prop 16, p 537) argues that in dealing with the *jus majestatis*, as in dealing with any *jus*, we have to draw a distinction between *ipsa vis et potestas* and *exercitium* On this basis we can explain *mixturae formarum* Poland is a democracy if we look at the *vis*, but a monarchy if we look at the *exercitium summae potestatis* *Leibniz on the mixed State*

127. On the beginnings of the theory that the three 'powers' should necessarily be divided—a theory which may already be traced in Buchanan and Hooker and Sidney—see the author's work on Althusius, pp 157 n 102, 163 n 119, 355 n 79 Sidney regards a 'mixed or popular government', combining all the three forms of State, as the best (c II, ss 8–29), but he does not definitely bring the idea of division of powers into connection with this doctrine. Locke also does not examine the relation of the system of division of *powers*, which he postulates in II, cc 12–14 and 19, to the mixture of the different *forms* of which he speaks in II, c 10, §132. [Gierke is here reading too much into Locke The passages cited (II, cc 12–14 and 19) do not warrant the view that Locke postulates a system of division of powers—at any rate so far as their exercise is concerned He simply seeks to distinguish, *in thought*, between the different functions of political authority He is dealing with the logical analysis of functions, rather than with the practical question of separation (or union) of the organs which exercise functions Distinguishing three functions, he only remarks (1) that in practice 'the legislative and executive powers come often to be separated', because the former is not always in session, while the latter is always in action, and (2) that the executive and federative powers are 'really distinct in themselves' (the one dealing with internal administration, and the other with treaty-making and foreign policy), but 'are almost always united' in exercise (II, c 12, §§144, 147) This implies a distinction between a legislative organ which is not always in session, and a joint executive-federative organ which is always in action, but it is a distinction merely based on continuity or dis- *Division of powers* *[Locke's theory of the three powers]*

continuity of operation, and Locke's theory of the 'supreme power' of the legislative (subject always to the over-sovereignty of the community itself) is a theory which does not square with the idea of a separation of powers as necessary to liberty On the whole, Locke believes in a united or single sovereignty, which is immediately vested in the legislative, and ultimately in the community—though he admits that where 'the executive is vested in a single person who has also a share in the legislative, there that single person, in a very tolerable sense, may also be called supreme' But this is a guarded phrase, extorted by English conditions, and immediately qualified and modified (II, c 13, §151), and Locke also hastens to add that 'the executive power placed anywhere but in a person that has also a share in the legislative is visibly subordinate and accountable to it' (§152)]

128. *Esprit des lois*, XI, cc. 2, 4, 6, VI, cc 5–6

129. Ibid XI, cc 4, 6 But Montesquieu is in favour of as much division of powers as possible even in simple forms of State, and he deals with the way in which it may be achieved under different constitutions, XI, cc 7–30

Montesquieu on division of powers

130. Montesquieu goes to the length of declaring that a constitution, in which *le peuple en corps* can draw all the powers into its own hands, is the greatest menace to liberty XI, cc 5, 6 In a proper State not only the judicial, but also the executive power is independent of the popular assembly or the assembly of popular representatives *le pouvoir arrête le pouvoir*, and the three powers can impede one another in moving, *mais comme par le mouvement nécessaire des choses elles seront contraintes d'aller, elles seront forcées d'aller de concert*, XI, cc 4, 6

131 *Contr soc* III, c 2

Rousseau's attitude to mixed constitutions

132 Ibid III, cc 4, 7 It depends on circumstances whether the *gouvernement mixte* is to be preferred to the *gouvernement simple* strictly speaking, there is hardly such a thing as a *gouvernement simple*

133 Ibid. II, c 2 Whether we look at the 'Subject' owning, or the 'Object' owned, Sovereignty is indivisible political theorists behave like Japanese jugglers, who cut a child into pieces, throw the pieces up into the air, and make a living child come down, *tels sont à peu près le tours de gobelet de nos politiques, après avoir démembré le corps social, par un prestige digne de la foire ils rassemblent les pièces on ne sait comment*

134 Ibid III, c. 1 just as all voluntary action has two causes which must both be operative, *volonte* and *puissance*, so, in the body politic, there must necessarily be a distinction between *volonté* and *force*, or in other words between *puissance legislative* and *puissance exécutive*, and while the former of these must belong to the sovereign body, it need not necessarily possess the latter

135. See n 74 to this section, cf also *Contr soc* II, c 6 and III, c 1, where the argument is pressed that legislation, being the only possible expression of the general will on general objects, is the only possible activity of the Sovereign when acting as such, while political activity of any other kind, being *action particulière*, is merely an *action de magistrature*, even when the Sovereign itself undertakes that activity [See n 74 supra, on the sovereign community turning itself into a democracy, and the citizens making themselves magistrates, for purposes of executive action]

136. Cf supra, n 78 to this section.

Sieyès on division of powers

137. Such an approach to the principle of division of powers appears in Sieyès, I, pp. 283sqq , 445sqq , II, pp. 363sqq , 371sqq. and 376sqq. Here

division of powers is justified by the argument that though there is only one political authority—that of the social body itself—there are different organs of that authority, based on different commissions given by the society Sieyès also attempts to argue for a system of *concours* of powers, instead of a balance or equilibrium

See also Fichte's *Naturrecht*, I, pp 193sqq (*Works*, III, pp 161sqq). Fichte, however, subsequently rejected the idea of division of powers in his *Rechtslehre* (*Posthumous Works*, II, p 632)

Division of powers and the mixed constitution

138 This combination of the mixed constitution and division of powers appears in Blackstone, *Commentaries* (1765), I, c 2sqq , in de Lolme, *The Constitution of England* (1775, first published in French in 1771), in the Abbe de Mably, *Doutes proposés aux philosophes économistes sur l'ordre naturel et essentiel des sociétés politiques* (1768), Lettre x, and *De la législation ou des Principes des lois* (1776), III, c 3, and in other writers [Among other writers who combine the mixed constitution and division of powers may be mentioned Paley, who in his *Principles of Moral and Political Philosophy* (1785), Book VI, c 7, argues (1) that the British constitution is formed by 'a combination of the three regular species of government', and (2) that the security of the constitution depends on a 'balance of the constitution', or 'political equilibrium', securing each part of the legislative—King, Lords and Commons—'from the encroachments of the other parts in the exercise of the powers assigned to it' The balance, Paley argues, is double it is both a balance of power, and a balance of interest Paley differs from the general continental usage in speaking of a balance or equilibrium, not of the three powers (legislative, judicature and executive), but of the three parts of the legislative This was natural in England, where the legislative, or King in Parliament, was regarded as everything, so that any parts or divisions must necessarily be parts of it It is this point of view which enables Paley to identify the mixed constitution with division or balance of powers, for if King, Lords and Commons are the powers divided or balanced, then—since they represent respectively monarchy, aristocracy and democracy—the constitution is a mixed constitution uniting all these three forms It may be added that Paley's view is the general English view of his time It is expounded by Burke in the *Thoughts on the Cause of the Present Discontents* (*Works*, in Bohn's edition, I, p 333), and also in the *Reflections* where the constitution is described as 'the engagement and pact of society' by which 'the constituent parts of a State are obliged to hold their public faith with each other' (*Works*, II, p 294) This general idea is criticised by Paine, both in his *Common Sense* of 1776 (where he assumes that 'the component parts of the English constitution' are 'the base remains of two ancient tyrannies', monarchy and aristocracy, 'compounded with some new republican materials in the presence of the commons', and then argues that 'to say that the constitution of England is a union of three powers, reciprocally checking each other, is farcical'), and in the *Rights of Man* of 1791–2 (where in Part I, Conclusion, he criticises 'mixed government, or, as it is sometimes ludicrously stiled, a government of *this that and t'other*', as a cause of corruption (because the hereditary part tries to buy up the elective) and of irresponsibility (because each part tries to shuffle off blame on the others) .. It seems curious, by the way, that the English thought of the eighteenth century does not regard the judicature as a 'part' of the Constitution, in any way parallel to the other 'parts' of which we have spoken But the reason is simple Concentration on the King in Parliament eliminates

[*Paley, Burke and Paine*]

the judges, who are not, as a body, a 'part' of that organisation At the same time we must notice that Paley, when he comes to the administration of Justice (VI, c. 8), is quite clear that it is 'the first maxim of a free State' that 'the legislative and judicial characters be kept separate', and that there should be a 'division of the legislative and judicial functions' Similarly Burke, though he regards the King and the two Houses as the constituent parts of the State, and as jointly sovereign, also says in his *Reflections* (*Works*, II, 476) that 'whatever is supreme in a State ought to have as much as possible its judicial authority so constituted, as not only not to depend upon it, but in some sort to balance it' . On the general theory of the parts of the constitution and separation of powers see the Report of the Committee on Ministers' Powers (Cmd 4060), pp 8 ff]

The theory of the mixed constitution in Germany

139 See, e g., Wolff, *Instit* §§993, 1004, Daries, §767 (but he argues, in §§786–7, that limited monarchy is not a *forma mixta*), Nettelbladt, §§1142, 1155–7, 1197 (who suggests, in dealing with the mixed constitution, that sovereignty can belong to several 'Subjects' at the same time in any one of three ways—(1) in *partes divisae*, or (2) *indivisa*, on a basis of joint ownership, or (3) partly divided and partly joint—and that none of these ways is absurd), and Ickstatt, *Opusc* II, op 1, c 1, §§18–21 (who takes the same line)

Hoffbauer (*Naturrecht*, pp 307–14) treats mixed constitutions with special fullness He divides them into three kinds—'limited', 'the mixed in the proper sense of the word', and 'partly limited and partly mixed' He is the only writer who attempts, after distinguishing the different 'Subjects' of sovereignty involved, to re-unite them again in 'a moral person in the wider sense' (pp 206, 292), but he does so by extending the conception of the moral person to a point at which it ceases even to imply the existence of a partnership among the different juxtaposed 'Subjects' (p 190, cf n. 190 to §16)

140 Frederick the Great himself (*Antimach* c 19) had already declared that the English Constitution was more worthy to be adopted as a model than the French.

141. Justi ranks as the best constitution the form which is a 'mixture' of the three simple forms, with a 'division' and 'equilibrium' of the different 'powers', and this is the basis of his sketch of an ideally good constitution for all times and places (*Grundrisz*, §§135–69, *Natur und Wesen*, §§51–61, 93–7, 142)

142 A. L. von Schlozer holds that all *Principes simplices* are a menace, and only a *Princeps compositus* is endurable We must therefore mix forms of State, as a physician mixes his drugs, and a mixture of the three forms, with a division of sovereignty, is 'the best attempt of poor humanity, which anyhow must have a State'. This ideal form has been attained in England, 'but it has not been discovered by Philosophy, or Romulus, or the Earl of Leicester.* it is due to accident, guided by *bon Sens*, and favoured by circumstances', pp 144–55, §§23–8, p 115, §3

Kant on the logic of the mixed constitution

143 Kant achieves this result by his famous comparison of the legislative, executive and judicial powers to the three terms (major premise, minor premise, and conclusion) in a practical syllogism, *Works*, VI, pp 418–20, VII, pp 131–6, 159–60 The three powers are co-ordinate with one another as 'independent moral persons', but at the same time, inasmuch as none of

* Simon de Montfort?

the three can usurp any of the functions of the other two, each is also subordinated to the others, ibid VII, p 134 Cf also p 153 supra

144 See Pufendorf, *J n et g* VIII, c 12, §§1–4 (it follows, he argues, that responsibility for past debts continues, ranks and orders still remain the same, etc), Alberti, c 15, §§5–9, Schmier, II, c 4, s 2, §1, Locke, II, c 19, §§211sqq , Hertius, *Opusc* I, 1, p 296, §§11–12, II, 3, p 54, §§7–8, Gundling, c 38, §§11sqq , Scheidemantel, III, pp 409 sqq *Continuity of public rights and duties*

145. Pufendorf, loc cit §§5–6, argues that when a State is divided into a number of States, its debts must also be divided *pro rata* An independent colony is not, however, responsible for the debts of the mother-country, since this is a case not of alteration but of procreation When several States unite to form an entirely new State, rights and liabilities are transferred to this new State, and when a previously independent State is made a province, the State annexing it must similarly take over its liabilities, along with its rights, as *in ipso corpore haerentia*. Cf also Schmier, loc cit , who holds that *divisio* or *unio* does not mean the destruction of the existing political authority, but partition of it or participation in it, Hertius (*Opusc* I, 1, pp 293sqq , §§9–10), who distinguishes the four cases of merger, annexation, simple adhesion, and personal union, Gundling, c 38, Scheidemantel, III, pp. 408–26

On complete disintegration of the State, either through the total disappearance of its physical basis or the total dissolution of its nexus, cf Pufendorf, loc cit §8, Schmier, V, c 4, s 2, §3, Alberti, c 15, §10, Hert, loc cit p 295, §10, Locke, II, c 19, §211, Rousseau, III, c 11

146 Cf nn 126, 129, 147, 161, 168, 170, 186, 213–14, and 238 to §16, and also n 7 to §17

The most detailed treatment of the question [i e the question of the nature of the 'person of the State' when the Ruler is a collective body of persons] is to be found in Ickstatt, *Opusc* II, op 1, *de jure majorum in conclusis civitatis communibus formandis* He starts from the principle that a decision of the State is a *voluntas totius reipublicae determinata de medio quodam saluti publicae effectum dandi*, that this determination of the will belongs to the 'active Subject' of 'supreme power', and that it is therefore achieved by the will of a 'single moral person' in a monarchy, and by the decision of a 'composite moral person', based on previous deliberation and argument, in 'polyarchical' forms of State He proceeds, on the basis of this principle, to deal with majority-decisions both under *jus publicum universale* (c 1) and under the public law of Germany (c 2) See also Heincke, I, c 3, §§16–23 *Rules for the action of a collective Ruler*

147. This was regarded as one of the cases in which *unus homo plures personas sustinet*, cf nn 139, 159 and 173 to §16 See also Huber, I, 3, §§24–38, and Nettelbladt, §1194

148 Titius refuses to distinguish public and private law by the different purposes to which they are directed, 'as is generally done', he prefers to distinguish them by the different 'Subjects' of rights to which they relate Public law relates to *Subditi constituendi*, and to *Imperantes constituendi et constituti qua tales*, private law relates to *Subditi constituti*, and to *Imperantes juxta conditionem privatam* Accordingly, while *Subditi constituti* in a formed and operative State [as contrasted with *Subditi* who have still 'to be constituted' when the State is in process of formation] no longer possess a *persona publica*, and have only a private personality, the Ruler always possesses a *persona duplex*, and we must always distinguish his public and his *Public and private law*

private personality. There are, however, mixed situations (such as that presented by the private law peculiar to princely families),* and the 'private person' of the *Princeps* is not necessarily *subdita* (*Spec jur publ* I, c 1, §§43–52).

149. Cf e g Huber, I, 9, c 5, §72; Hert, *Comment. et Op* I, 3, p 52, §§4–5; Wolff, *Instit* §1012 (where a distinction is drawn between *actus regii et privati*)

The Ruler and his officials

150. Mevius, for example (*Prodromus*, v, §29), and Hert (loc. cit. p 53, §6) argue that the Ruler, and therefore the State itself, acts when the *ministri summae potestatis* act, provided that the latter are acting within the limits of their office Schmier, on the other hand, argues altogether in terms of private law (III, c 5, nos 48–64, *de obligatione summae potestatis ex facto et non facto officialium*) See also Stryck, *Diss* IV, no 15, *de obligatione Principis ex facto ministri*

The inheritance of obligations by a Ruler

151. Huber, I, 9, c. 5, §§53–72 *obligationes, quae propter rempublicam initas sunt, tenent omnino successorem, non ut haeredem, sed ut caput civitatis, immo ut ipsam Civitatem* where such obligations are concerned, there is no question of *probabilis ratio, versio*† and the like, the only question is whether the *Imperans, qui personam Civitatis constituit*, has acted within 'the limits of his power'. Pufendorf, *J n et g* VIII, c. 10, §8 *ipsa civitas obligata*, but its obligation exists only when there is *probabilis ratio*, and does not extend *in infinitum* Schmier, II, c 4, s 1, §3 the question is whether the *corpus Universitatis* is bound, and this is the case when a contract has been made, *nomine populi et ad salutem communem*, within the sphere of the Ruler's office

All these three writers, it should be added, seek to apply the usual rules of simple inheritance in dealing with 'patrimonial' States, it is only when they are dealing with *regna voluntaria* or *usufructuaria* that they distinguish between inheritance of private property and succession to the Crown Titius (IV, c 5) opposes this point of view He argues that when a Ruler has duly acted in the name of the *Respublica*, and thus the *Respublica* '*per caput suum voluit*', his successor incurs responsibility in all cases alike [whether the monarchy be patrimonial or non-patrimonial] for one and the self-same reason—viz that '*respublica velut persona immortalis adhuc durat et nunc etiam adhuc vult*' It is true that in non-patrimonial monarchies the successor does not take over his legal position from the *defunctus*, but he takes over his position, none the less, from the *civitas ipsa* The analogy of the limited responsibility of a tenant succeeding to a fief does not hold good [in regard to a non-patrimonial monarchy] the new tenant of the fief succeeds to a *homo singularis*, while the new holder of the Crown succeeds to the *caput corporis liberi et adhuc durantis*, in the one case it is the *factum defuncti* which is in question, while in the other it is the *factum personae viventis* The same rule, therefore, applies to elective [or non-patrimonial] monarchies as to other forms, and exceptions [from this general rule of the successor's responsibility] can only be recognised when there has been an act of the predecessor contravening the fundamental laws—for then it can be said that *respublica non egit*—or when there has been a case of *inconsulta prodigalitas* or some other special circumstance [Roughly expressed,

* The *Hausrecht* or dynastic rules regulating e g marriage

† *Versio* = *versio in rem* = an application of money or other proceeds by the previous ruler to the *res* to which the new ruler succeeds, so that the new ruler benefits by such application, and may therefore be held to incur a correlative obligation Cf n 89 to § 14.

the difference between Titius and his three predecessors is that they were ready to allow that the *hereditary* king of a patrimonial monarchy inherited all the rights and obligations of his predecessor in title, but held that a *non-hereditary* king was in a different position, Titius, on the contrary, contends that there is no difference between the two, because in either case the rights and obligations are really those of the immortal State, and their continuity is not affected in any way by the hereditary or elective character of the Ruler Perhaps we shall understand the theory of the predecessors of Titius better if we assume that in their view a 'patrimonial' monarchy is not simply an hereditary monarchy it is a monarchy in which, as Loyseau says, 'the king by title of prescription possesses or owns sovereignty', and therefore (if sovereignty be regarded as the essence of the State) owns, or is, the State (*l'État c'est moi*) On this basis the king in such a monarchy of course takes over everything alike from his predecessor—public rights equally with private, and public obligations equally with private—because there is no distinction between public and private, all public status having become the possession or property of the king When we get to non-patrimonial monarchies, we shall have to distinguish 'private' and 'public', but if we hold the view of patrimonial monarchies just described, it will only be when we get to monarchies other than patrimonial that we shall begin to make this distinction Titius, we may add, is really challenging the idea at the bottom of the 'patrimonial theory', at any rate by implication]

J P von Ludewig (*Op* I, 1, op 8, pp 539–646, *De obligatione successoris in principatus*) puts the conception of patrimonial monarchies completely aside, and thus rejects the usual distinctions drawn by other writers He uses, as the thread to guide him through the labyrinth, the dictum of Baldus, that the successor is responsible if, and to the extent that, there has been action *nomine et auctoritate Reipublicae inter tot mortes principum suorum immortalis* (c 1, §8) He accordingly denies that the successor is bound in any case where the 'limits of the office and dignity' have been overstepped by his predecessor, and he therefore decides the question of the extent of the successor's responsibility, in any particular case, by the *formula imperii* [which fixes 'the limits of the office and dignity'], c 4. But even Ludewig, in the issue, falls back into a private-law point of view, cc 5–7 [i e he lets drop the thread of the public-law rights and duties of the immortal *Respublica*, and goes back to terms of the private-law rights and duties of the personal ruler]

152 J H. Boehmer (*P spec.* I, c. 3, §35, II, c 3, §16) goes to the length of making *all* responsibility [incumbent upon a successor] depend simply and solely upon hereditary succession to the *universitas juris*, and he accordingly considers *successores titulo singulari* (e.g rulers by right of election or by virtue of contract) as not intrinsically obliged, because they rule *ex novo plane jure*. But he adds that it is proper for such rulers to recognise any act of a predecessor which has been done *intuitu officii* or has brought advantage to the State

153 See the author's work on Althusius, pp 305–6 The only dispute turned on the question, what was necessary to constitute legitimation [of an irregular ruler] At first, thinkers were generally content to answer, 'The express or tacit assent of the people'. Later, we find the advocates of popular sovereignty insisting exclusively on the necessity of an absolutely free assent of the people (e g Sidney, III, s 31, and Locke, II, c. 16,

When the usurper becomes legitimate

§§175–96, c 17, §§197–8), while the advocates of the sovereignty of the Ruler require, in addition, an act of renunciation by the legitimate ruler (e.g. Kestner, c. 7, §§20–1, H Cocceji, *De regimine usurpationis rege ejecto*, Frankfort, 1705, Schmier, II, c. 2, s. 2, §1, nos 82–98, Nettelbladt, §§1267–8, and Achenwall, II, §98) Often, however, the mere fact of possession was allowed to confer a prescriptive title to ruling authority

From an opposite point of view [i e from a point of view which does not seek to safeguard the rights of the legitimate ruler] we find Hobbes (*Leviathan*, c 21), Conring and J H Boehmer (*P spec.* III, c 12, §17) declaring that the people is quit of all responsibility to the legitimate ruler as soon as he is no longer in a position to protect them, while Horn (II, c 9, §§4, 21), though rejecting prescription as a title to rule, allows majesty to be extinguished by the *de facto* acquisition of majesty by a new ruler The theory of the *fait accompli* then gains ground gradually, even among the disciples of Natural Law.

Different views of the usurper's position

154. The stricter school of thinkers continued to maintain the old theory —that any representation of the State by a usurper was impossible, that all his acts of government were void, and imposed no obligation, that refusal of obedience to him was the right and duty of every individual, and even that private persons were free to attack him as a public enemy and put him to death We find this view not only in Althusius and the other *monarchomachi*, in Suarez and the rest of the Catholic writers on Natural Law, and in Bodin, Arnisaeus and their successors, but also in Huber (I, 9, c 1, c 5, §51), Schmier (loc cit), Fénelon (who holds, c VIII, that *le Roi de Fait* and *le Roi de Droit* must be distinguished, and that the theory of obedience being due even to the *de facto* king, as *Roi de Providence*, is erroneous), H Cocceji (loc. cit.), Nettelbladt (§1267) and others.

On the other hand, we find Grotius—on the ground that *some* sort of government is necessary—already contending that the people is obliged to obey the actual holder of political authority, in things necessary, even before there has been any legitimation by *longum tempus* or by *pactum* (I, c 4, §15), and he therefore limits the right of resistance to any actual ruler (ibid. §§16–20), just as he also holds (II, c 14, §14) that contracts made by a ruler during an interregnum involve the people and the subsequent legitimate ruler, at the very least, in responsibility *de in rem verso* [i e for expenditure incurred, as we might say, 'in connection with the estate', cf n 151 supra] Pufendorf has a different theory the usurper genuinely represents the State in its external relations, and he thus binds it in that respect by his donations etc , but internally his acts—his laws as well as the donations or alienations he makes—can be rescinded by the legitimate authority, *J n et g* VIII, c. 12, §4 On the theory of the *fait accompli*, the usurper represents the authority of the State at all points, even in regard to his subjects [i e internally no less than externally], as soon as the expulsion of the rightful owner of political authority has been achieved Cf Boehmer, loc cit , and also Kant, *Works*, VII, p 139.

155. Horn, refusing to recognise any personality of the State, naturally ascribes the ownership of all public property to the *Princeps* alone, *De civ* II, c 3, §§5–9

The Ruler in relation to State property

156 Cf. especially Mevius (*Prodromus*, v, §32); Huber (who speaks of public property as being *in patrimonio cuntatis*, since the *civitas* has *jus personae*, II, 4, c 1, §§24sqq), Pufendorf (who regards public property as owned by the *civitas qua talis*, and considers the king as having only the rights of a

tutor therein, so that he has no right to alienate it apart from the people, *J n et g* VIII, c. 5, §8, *De off hom et civ* II, c 15, §5), Titius (III, c 7, §§2sqq), Wolff (who distinguishes *bona regis regia et publica* from *bona privata seu propria*, *Instit* §1012), Daries (*bona publica sunt in dominio totius civitatis*, *bona privata in dominio civium*, the latter partly belonging to the Prince and partly to his subjects, §§687sqq), Nettelbladt (§§1347sqq), Achenwall (II, §123), Scheidemantel (who speaks of 'the property of the whole nation', assigns 'its supreme administration' to the sovereign, but assumes a right of the whole nation to consent to its alienation, pp 320sqq , 333sqq)

Classification of State property

157 Theorists began by distinguishing *res publicae* from *patrimonium reipublicae*, according as public property was destined for common use by all individuals (*ad usus singulorum*) or for the immediate purposes of the State itself (*ad usus universorum*) cf Huber, II, 4, c 4, §§2sqq , Titius, III, c 7, §§5sqq , Daries, §687, Scheidemantel, pp 330sqq

In regard to the first of these categories (*res publicae*) there was a difference of opinion Were *res nullius* to be included without further question in the category of State-property (this was the view of Horn, loc cit §§5–9, and Titius, loc. cit §§11sqq), or at any rate (if that were not allowed) could they be brought into this category by a declaration made by the State, in virtue of its right of majesty (the view of Gundling, c 36, §§217–20, and of Scheidemantel, loc cit)? Or did *res nullius* come to be the property of the State only in virtue of its actually exercising a right of occupation, such as it was intrinsically free to exercise, though the right might be to some extent limited by other rights of exclusive appropriation which had their basis in positive law (this is the view of Huber, II, 4, c 1, §§30sqq , c 2, §§12–25, and of Nettelbladt, §§1345–6)?

State-property in the strict sense (i e. *patrimonium reipublicae*) was generally divided into property belonging to the *aerarium* and property belonging to the *fiscus* (cf Pufendorf, loc cit , Gundling, c 36, §§211–2, Wolff, §§1038–9), but Gundling remarks that there is fundamentally no difference between the two [Some remarks may be added in elucidation (1) The conception of *res nullius* is fully discussed by Pound, *Introduction to the Philosophy of Law*, pp 197sqq. (2) On occupation as a basis of State-property, and on the possible limitation of the State's right of occupation by positive-law rights, cf Mommsen, *History of Rome* (Eng. trans), III, p 96, where (in connection with the legislation of the Gracchi) the problem is discussed how far the State's right to its 'occupied domains' could be modified by private rights, based on positive-law titles of long prescription or recent acquisition (3) Finally, as regards the distinction between *aerarium* and *fiscus*, we may note that this really belongs to the system of dyarchy instituted by Augustus, under which the senate and the *princeps* seemed to rule conjointly, and while the former had the *aerarium*, the latter had the *fiscus* as a separate treasury—both, be it noted, being public and official treasuries.]

The Ruler's demesne

158. Huber distinguishes four species of property in a monarchy—*res privatae principis*, *res dominicae*, *res fiscales* and *res aerarii*—but he admits that the second and the third are often difficult to distinguish (II, 4, c 4, §§35–50) Gundling (loc cit §§213–16) and Wolff (§1040) both rank demesne as a third species of public property, by the side of that of the *aerarium* and that of the *fiscus*, and they hold that the prince possesses a limited right of ownership in the demesne, being unable to alienate it freely on account of its connection with territorial sovereignty.

Demesne included in State property

159 This is the view of Danes, §§691–4. He simply distinguishes *bona fisci* and *bona aerarii*, including under the former what is intended immediately for the personal support of the territorial prince [this, of course, differs from the old Roman use of the term], and under the latter all that is directly designed for the maintenance of the State itself, and, on this basis, he allows the prince *administratio* only of the latter, but gives him both *administratio* and *jus utendi* of the former * A similar line is taken by Achenwall (II, §124), and more especially by Nettelbladt (§§1347–9), who distinguishes from the demesne [which is the property of the State] not only the *patrimonium principis*, but also the *bona familiae ejus qui princeps est* (*Haus- und Stammguter*)

Ownership of the State's territory

160. Cf Wolff, *Instit.* §1125, Nettelbladt, §§1144–51 Only as regards patrimonial States was the conception of 'property', amounting to a full right of ownership, extended to include the whole country, but many thinkers rejected the whole idea as untenable for that very reason [i.e they rejected the whole idea of the patrimonial State, because it involved as a consequence the King's ownership of his territory as his own property] Cf p 144, supra

Dominium eminens *in Horn and other writers*

161. Horn (II, c 4) is the strongest advocate of the view that *dominium eminens* is not only *imperium*, but a *verum dominium*, a real legal property which the State has reserved for itself in distributing private property, and which signifies the whole body of the limits to which private property is subject But see also Huber (I, 3, c 6, §§30–53), Pufendorf (*Elem* I, def 5, §5), J H Boehmer (I, c 4, §§25–7), Stryck (*Diss* XIV, no 7) and Wolff (*Instit* §1065)

Other views in regard to this question

162 Titius, for example, distinguishes sharply between *dominium publicum*, which only differs from *dominium privatum* in that the 'Subject' or owner is different, and *dominium eminens*, which is really *pars imperii*, and only nominally 'property' or *dominium* (III, c 5, §51, c 7, §2) Gundling argues that the basis of expropriation is not *dominium eminens*, which only belongs to the prince in a *civitas herilis* [i e in a patrimonial State], but *imperium eminens* (c 36, §§226–9) Danes also rejects the conception of *dominium eminens* as a basis for the rights of taxation and of expropriation of *bona privata* (§§695–701) Cf also Achenwall, who writes of a *jus eminens* which takes the two forms of *dominium eminens* over things and *potestas eminens* over persons (II, §§145–7), and Scheidemantel, who holds that the rights of 'majesty' in regard to private possessions are not derived from any property vested in it, but from its superior authority, though many writers call this 'a superior property' or eminent domain (pp 360–4).

* The translator, in this clause, has inverted the statement in Gierke's text, which apparently makes Danes assign to the prince only *administratio* of *bona fisci*, but both *administratio* and *jus utendi* of *bona aerarii*.

§ 18 THE NATURAL-LAW THEORY OF CORPORATIONS

The position of the Family

1 Cf e g Cellarius, *Pol* cc 2–8, Johannes a Felde, *Elem* I, c 1, Boecler, I, cc 2–6, Clasen, I, cc 2–6, Mullerus, *Instit* I, cc 2–7, Horn, *De civ* I, cc. 1–4, Alberti, cc 10–14 See also Pufendorf (*J n et g* VI–VII and *De off hom et civ* II, cc 2–5), who, however, refuses to admit the Family as a separate and independent stage in the development of associations (which would set it on the same level as the three *personae morales compositae* constituted by the domestic groups of husband and wife, parent and child, and master and servant), and accordingly designates 'the most perfect society' of the State as *societas quarta* Thomasius takes the same line [i e he recognises only the three domestic groups and the State as societies] in *Instit jur div* III, cc 1–7 (cf also c 1, §§ 13–14, where he argues that the Family, regarded as a union of the three *societates simplices*, has no specific purpose of its own), and so does Schmier (I, c 2, ss 1–4) Cf also Praschius, §§6–11, Placcius, Bk I, Rachelius, I, titt 15–31

Even Wolff, although he begins with a detailed theory 'of authority and society (*Herrschaft und Gesellschaft*) in general' (*Instit* §§833–52), is like other thinkers [i e in omitting fellowships and local communities], he only admits as natural-law groups (*a*) the societies constituted under the family-system (though he allows four of these—the 'marital', the 'parental', the 'magisterial' and the Family—§§854–971), and (*b*) the State (§§972sqq) Achenwall takes exactly the same line (*Proleg* §§91sqq and Part II, §§1sqq, where he treats of *societas in genere*, of the four *societates domesticae*, and of the State)

Thomasius on local communities as only 'parts'

2 Thomasius (loc cit c 1, §§15–32) explicitly justifies a direct transition from the Family to the State, without any consideration of intervening groups, on the grounds (1) that a local community has no specific purpose, and (2) that a State might possibly be composed only of a single territorial community, which proves that *vici et provinciae non tam a civitate differunt specie ac finibus, quam ut partes a suo toto*, §30 [i e local communities differ from a State, not as being a different species with their own specific purpose, but only in the way in which parts differ from the whole which they jointly constitute—that is to say, in the way of quantity Thomasius implicitly assumes that a 'part' is the same, in kind and purpose, as the 'whole' to which it belongs] Schmier takes the same line, I, c 2, s 4, no 127

3 Thomasius, *Instit jur div* I, c 1, §98

4. Cf Schmier, V, c 1, who speaks of *subditi conjunctim aut collegialiter spectati* See also Pufendorf, *J n. et g* VII, c 2, §§21–2, Hertius, *Elem* II, 2, §41, J H Boehmer, *P spec* II, cc. 4–5, Scheidemantel, III, pp 244sqq

Theories favourable to intervening groups

5 See [as examples of a theory which admits a variety of societies, over and above the Family and the State] Mevius, who enumerates in his list *societas domestica*, with its three species, the *corpus, pagi, urbes, terrae seu regna, foedera* (*Prodromus*, V, § 19), Micraelius, who reckons *societas domestica* (I, cc 2–6), the *vicus* and *pagus* (c. 7, §§ 1–24), the *tribus, collegium, corpus et universitas* (ibid. §§25–32), *oppida, regiones* and *civitas* (c 8); Knichen, who includes the four 'domestic societies', *collegia, territoria*, and the *civitas* (I, cc 4–6), and Becmann, who makes two divisions—the one including the Family, *corpora*,

collegia, systemata and the *respublica*, the other embracing *vici, pagi* and *urbes*, which, however, are only *partes integrantes reipublicae* (*Med* cc 7–11)

Leibniz on groups

6 Leibniz, *Deutsche Schriften*, I, pp 414–20 Leibniz starts, it is true, by enumerating only six sorts of 'natural society'—the four societies of the family-system (those of husband and wife, parent and child, and master and servant, with the addition of the household composed of these three and intended to provide for temporal needs), the civic community (the town or rural area, intended to promote temporal well-being), and the Church of God (for the purpose of eternal felicity) But when he comes to the 'classification of societies', he distinguishes equal and unequal, limited and unlimited, and simple and compound, and he adds that 'limited' societies require federation, as they cannot all attain their purpose of promoting well-being by themselves The final result is thus a system of many societies, including households, social groups (guilds or castes), villages, monasteries, orders, towns, rural areas, and finally the whole human species, which is 'also a community' when regarded as the Church of God

The State and other groups regarded as alike

7. S Cocceji, for example, in his *Novum systema*, after giving an account of the Family (III, c 4) and the State (c 5), expressly declares that 'the like' (*par ratio*) is true of all *corpora et universitates* (§205), and later on, when he is dealing with the conception of the *corpus artificiale*, he treats the State as only a 'conspicuous example' of that type, along with the *collegium*, the *judicium* and the *familia* (IV, §§280–1) Wolff, Heineccius, Achenwall and other writers also treat corporations as the products of a like process to that which has brought the State into existence

8 See the section on *jurisprudentia naturalis generalis socialis* in Nettelbladt's *Systema naturale* (§§326–414), and the section on *jurisprudentia positiva generalis socialis* in his *Systema jurispr pos* (§§846–912).

9. Cf e.g Daries, *Instit. jurispr univ*, *Pars spec*, sect 3–5, Heincke, *Prol* c 1, §§4–6, Hoffbauer, *Naturrecht*, pp 186sqq

Theories of 'concession'

10 Cf Perezius, *Jus publ* pp 318–19, M. Schookius, *De seditionibus*, Groningen, 1664, III, c 8, pp 835sqq, Felwinger, *Diss de coll et sodal* pp 308sqq, §§18sqq, Mastrilio, *De magistratibus*, Venice, 1667, III, c 4, §441, Becmann, *Med* c 10, §8, Knichen, *Opus pol* I, c 5, th 4

State control of meetings

11 Cf Horn, *De civ* II, c 2, §14 *majestas* only can assemble people together in *comitia, concilia et conventus, qui sine superioris praescitu aut jussu multitudinem congregare fuerit ausus, jus majestatis praecipuum nefarie inviolat* See also Schookius, loc cit pp 832sqq, 837, 839, Felwinger, loc cit §§51–3, Mastrilio, loc. cit. §§444–6

State control of group-life

12 Cf Schookius, loc cit pp 835sqq (there can be no elections and no assembly of any kind without governmental supervision and co-operation), Felwinger, §§44–7, Mastrilio, III, c 3, §§47sqq and c 4, §§444–6 (the *Princeps* must confirm *venditiones, impositiones, alienationes, expensiones, electiones officialium et alia acta universitatum* the utmost that is possible without the assent of the prince is the raising of a levy in an emergency, when there is danger in delay), Knichen, I, c 5, th 8–9, Becmann, c 10, §8, Andler, *Jurispr* pp 102sqq (all *statuta* of corporations require confirmation)

Myler ab Ehrenbach contends (c 5, pp 198sqq) that territorial towns [i e towns in one of the territorial principalities of Germany] and all other territorial corporations can never appoint magistrates *proprio jure*, but must always appoint them *auctoritate principis territorialis* such magistrates, therefore, are subject to confirmation and supervision by the prince, and derive

all their jurisdiction from the 'ocean' of his plenitude of power within his territory, the territorial prince retains a co-ordinate jurisdiction, his *delegatus* has precedence, and his personal appearance causes the lapse of all corporate authority

Von Seckendorf, too, has nothing to say about local communities or corporations as exercising rights of their own in a principality he only mentions them as the objects of the prince's care and supervision (II, c. 8, §9, c. 14, III, c. 2, §5, and c 3 to c 6, §7).

13. Schookius, p. 838, Felwinger, §§54sqq ; Knichen, I, c 5, th 15 (a corporation may be abolished not only for delict or misuse of its powers, but also *utilitatis publicae causa*), von Seckendorf, *add* 42 to II, c 8, §9 (where he argues for freedom of trade and the abolition of guilds)

14 Spinoza would abolish all *collegia* or guilds in an aristocracy, when an aristocratic State is composed of a single city (*Tract pol* c. 8, §5), but in an aristocratic State composed of a number of cities he would allow the several cities considerable independence, even though they ought to constitute *unum imperium* and not a mere confederation (c. 9) In a monarchy he suggests mechanical subdivisions, which he calls *familiae*, as the basis of the royal council (cc 6–7) *Attitude of Spinoza and Hume to groups*

Hume, in sketching the constitution of an ideal State (in which he refuses to follow the fantasies of Plato and More, but allows some merit to Harrington's *Oceana*), divides the country into 100 counties, and each county into 100 parishes Each parish chooses one representative, and the 100 representatives of each county choose 10 county-magistrates and a senator The 100 senators of the whole country exercise executive power the county representatives, meeting in their particular counties, 'possess the whole legislative power of the commonwealth—the greater number of counties deciding the questions, and where they are equal, let the senate have the casting vote' * In this way the advantages of a large and those of a small commonwealth may be combined (Essays, Part II, Essay XVI, *Idea of a Perfect Commonwealth*)

15 In the article *Fondation*, in vol VII, p 75, §6 of the *Encyclopédie*, Turgot vindicates for the State the right of reforming or completely suppressing all foundations 'The public good is the supreme law, and the State must not be deterred from pursuing it either by a superstitious regard for the intentions of the founder or by fear of the pretended rights of certain bodies *ni par la crainte de blesser les droits prétendus de certains corps, comme si les corps particuliers avoient quelques droits vis-a-vis l'état, les citoyens ont des droits, et des droits sacrés pour le corps même de la société, ils existent indépendamment d'elle, ils en sont les élémens nécessaires et ils n'y entrent que pour se mettre avec tous leurs droits sous la protection de ces mêmes lois, auxquelles ils sacrifient leur liberté, mais les corps particuliers n'existent point par eux-mêmes, ni pour eux, ils ont été formés pour la société et ils doivent cesser d'être au moment qu'ils cessent d'être utiles* *Turgot on 'particular bodies'*

16 *Contr Soc* II, c. 3 *Quand il se fait des brigues, des associations partielles aux dépens de la grande, la volonté de chacune de ces associations devient générale par rapport à ses membres et particulière par rapport à l'État, on peut dire alors qu'il n'y a plus autant de votans que d'hommes, mais seulement autant que d'associations Les différences deviennent moins nombreuses et donnent un résultat moins général* If *Rousseau's dislike of associations*

* The translator has cited Hume's own words instead of Gierke's paraphrase, which is not quite accurate

one of these associations gains preponderance, there is no *volonté générale* at all.

17. Ibid *il importe donc, pour avoir bien l'énoncé de la volonté générale, qu'il n'y ait pas de société partielle dans l'État* If there are such societies, they must be made as numerous and as equal as possible· cf IV, c 1

Churches and church-property

18 The most important of the opinions expressed in the Assembly, with regard to the theoretical legal basis of secularisation, are collected in Hubler's work on *Der Eigentümer des Kirchenguts* (Leipzig 1868) and in P Janet's article on *La propriété pendant la Révolution Française* (*Revue des deux Mondes*, XXIII (1877), pp 334–49). [See E. de Pressensé, *L'Église et la Révolution Française*, 1890] These opinions, as a rule, start from a general view of the relation of all corporations to the State, since there was almost universal agreement about the nature of church-property as corporation-property. [Burke has a striking passage in the *Reflections* (*Works*, Bohn's edition, II, 378) on the revolutionary view of church-property as corporation-property. 'They say', he writes, 'that ecclesiastics are fictitious persons, creatures of the State, whom at pleasure they may destroy, and of course limit and modify in every particular that the goods they possess are not properly theirs, but belong to the State which created the fiction ' He does not seek to refute this conception of the *persona ficta*, he simply dismisses it as a 'miserable destruction of persons', and he contents himself with arguing that church-property is 'identified with the mass of private property, and that its owners have the same title of accumulated prescription as other owners'. Mackintosh, in his reply to Burke (*Vind Gall* sect 1, ad finem), makes a distinction between the Church and other corporations Other corporations are 'voluntary associations of men for their own benefit', and their property is part of the mass of private property, so that 'corporate property is here as sacred as individual'. But the Church is a peculiar corporation—'the priesthood is a corporation endowed by the country, and destined for the benefit of other men', so that it may properly be limited or modified if its possessions and powers are not used for that benefit]

Views on the ownership of church-property in the Assembly

19 The Abbé Maury, for example, argued, on October 13, 1789, that church-property was the property of the clerical corporation, and the property of a *corps* was as truly property as that of *individus*. It was sophistry to distinguish between the legal basis of the one sort of property and that of the other in both cases the right of property was not prior to the law, but was created by the law, and *détruire un corps est un homicide*, because it is to take away its *vie morale* The Abbé de Montesquieu argued to the same effect on October 31 . We also find isolated attempts to defend the theory of the property-rights of *institutions* [i.e to argue that even foundations or *Stiftungen*, as distinct from the *corps* or corporation, may acquire property rights] this was the line taken by Montlosier on October 13. Another speaker, the Abbé Grégoire, in a speech of October 23, ascribes church-property to founders and their families, or to parishes and provinces [The debate about the question, 'Who owns church-property', is as old as the investiture-contest in the time of Gregory VII—when one side, representing the lay tradition of the *Eigentumskirche* (or 'proprietary church'), answered, 'The laity (kings and magnates) who built the church and own the land on which it stands', and the other, representing the ideas of canon law, replied, 'The saint to whom the church is dedicated, and, by extension, the institution which represents the saint'. The old issue may be said to be repeated in the

French Revolution, with the nation adopting the lay tradition of the *Eigentumskirche*, and challenging the canonical idea of church-property as *Anstaltsgut*]

Mirabeau on church-property

20 This is the view which underlies the speeches of the radical orators who argued that church-property was simply the property of the State Mirabeau in particular, in his speeches of October 31 and November 2, arrives at the conclusion that the real ownership is vested in the nation, although —or rather, because—church-property is owned by corporate bodies For corporations do not exist, as individuals do, before the creation of civil society, and they are not, as individuals are, *élémens de l'ordre social* they owe their existence entirely to the State, and they are only its shadows (*aggrégations qui ne sont que son ombre*) It is the State which, at its discretion, grants or denies them the capacity of owning property, and it can also abolish them and take their property for itself But if the possessions of a corporation are thus 'only uncertain, momentary and conditional', and even its mere continuance is altogether precarious, we must *supposer pour ces biens un maître plus réel, plus durable et plus absolu*. We find such a 'master' in the nation *celui seul, qui doit jouir des biens du corps lorsque ce corps est détruit, est censé en être le maître absolu et incommutable, même dans le temps que le corps existe* Barnave, Malouet, Dupont and Le Chapelier argued in the same sense Garat, speaking on October 24, added an historical corroboration of this view, Treilhard and Chasset were even more radical, denying altogether the existence of corporate bodies

The argument of Thouret

21. It was in this sense that Thouret sought, on October 23 and 30, to develop the ideas of Turgot *Les individus et les corps diffèrent par leurs droits, les individus existent avant la loi, ils ont des droits qu'ils tiennent de la nature, des droits imprescriptibles, tel est le droit de propriété tout corps, au contraire, n'existe que par la loi, et leurs droits dépendent de la loi* The State can thus modify or abolish corporations at will it can withdraw their capacity for holding property, just as it gave it *La destruction d'un corps n'est pas un homicide* indeed, its destruction is a duty, what society needs is real owners, and we cannot consider as real owners these *propriétaires factices qui, toujours mineurs, ne peuvent toucher qu'à l'usufruit Les corps n'existent pas par eux, mais par la loi, et la loi doit mesurer l'étendue dans laquelle elle leur donnera la communication des droits des individus tous les corps ne sont que des instruments fabriqués par la loi pour faire le plus grand bien possible, que fait l'ouvrier, lorsque son instrument ne lui convient plus? Il le brise ou le modifie*

Dupont argued in a similar sense on October 24, and Pétion on October 31: Talleyrand had already done so, on the proposal for secularisation, on October 10 The terms of the decree of November 2 corresponded to this line of argument: it did not directly assign church-property to the State it declared, *Tous les biens ecclésiastiques sont à la disposition de la Nation* [which could then use them to endow those 'real owners' (the individual peasant or bourgeois) who, on Thouret's argument, are 'what society needs']

Sieyès on Corporations

22. In his pamphlet on the *Tiers État*, Sieyès argues that all corporations destroy the unity of the nation, which includes only individuals, and only what is equal and common in all individuals If public officials let themselves be compelled to form *corps*, they must lose electoral rights during the term of their office, while as for ordinary citizens, it is a requirement of social order that they should not unite in corporations It is the very acme of perversity if the legislator should himself create corporations, or should

acknowledge and confirm them when they create themselves, or should declare the most privileged and greatest of corporations, the Estates, to be parts of the National Assembly· cf *Political Writings*, I, pp. 167–72 [Cf also Mackintosh, *Vind Gall* sect. 1: 'Laws cannot inspire unmixed patriotism. But ought they for that reason to foment that *corporation spirit* which is its most fatal enemy?']

His defence of corporate property

23. In his *Observations sommaires sur les biens ecclésiastiques* (1789), Sieyès gives vigorous expression to the idea that, while the existence of every *corps moral* (clergy, town, hospital, college, and the like) depends on the national will, and while the abolition of a corporation must carry with it the confiscation of its property, it is none the less true that a moral body, so long as it remains such, has rights of property which are no less sacred, and no less inviolable, than those of individuals, or indeed of the nation itself—for the nation, after all, is only a moral body The State, therefore, may kill corporations, and it may become their heir by doing so, but it cannot legally declare that their property belongs to itself [during such time as they remain corporations], *Pol. Writings*, I, pp 461–84. In his pamphlet on Tithes (1789), and in his Proposal for a provisional decree relative to the clergy (1790), Sieyès argues in the same way, ibid. I, pp 485–98, II, pp 29–70.

24 *Pol. Writings*, I, pp 292 sqq (esp. p 295), 380 sqq , 509 sqq , 561 sqq.

His attitude to local communities

25 Thus he says (in his pamphlet *On the means*, etc., I, p. 208) that the division into *départements* is not like that into estates, fraternities and guilds· it is as different as day is from night. But he defends himself from the accusation of wishing to turn France into a federation (preface to part I, p xii), and from that of having dissolved it into an aggregate of petty republics (II, pp. 225 sqq , 235 sqq.) He always insists that the *départements* and *communes* continue to remain parts of one whole, even though they are recognised as separate wholes for affairs within their own sphere (I, pp 382–5, 561).

26. He mentions only the Church as a corporative element, and he depicts it in terms of unrelieved 'territorialism', *Natur und Wesen*, §§ 197, 213–220 [On 'territorialism', cf. n * to p 89]

Scheidemantel on associations

27 Cf I, p 253. 'We should above all things direct our attention', Scheidemantel writes, 'to the societies in our territorial principalities, for any group in the State, which has been formed by specific agreement, or by mere chance, for the pursuit of a definite object, has an influence on the government, even if it be only in an indirect way A prudent constitution will allow no secret assemblies, and it will recognise no societies as legal save those which have received the express or tacit assent of majesty ' If this is not done, there will be parties and cabals. Every group should be dissolved and punished. Liberty in England is the mother of mischief, and the Roman laws were wise No subject can or should institute societies of his own motion (III, pp. 291 sqq) Cf. also I, pp 295 sqq , III, pp 244, 246 [Even in England we find Paley, who was not illiberal, following a line of argument which is not dissimilar (*Moral and Political Philosophy*, VI, c. III ad finem)

[The views of Paley]

'As ignorance of union, and want of communication, appear amongst the principal preservatives of civil authority, it behoves every State to keep its subjects in this want and ignorance, not only by vigilance in guarding against actual confederations and combinations, but by a timely care to prevent great collections of men from being assembled in the same vicinity Leagues thus formed and strengthened may overawe or overset

the power of any State' But Paley, writing in 1785, was probably thinking of the Gordon riots of 1780 and of 'combinations' of workers, and he would have been the last to deprecate the existence of the Tory or, for that matter, of the Whig party]

28 Cf I, p 255: even permitted societies should be kept under careful supervision, they must be made to produce their rules and regulations from time to time, to render accounts, and to submit to visitation This should particularly be the case with professedly religious societies, but it should also hold good of 'free societies', such as the East India Companies, which are never free in any but a relative sense, and must always be subject to a presumption against their being left independent. Cf. III, pp 245–6 *He insists on State control*

29 A capacity for rights and duties is only allowed to a corporation as a means to the public benefit, and it is a condition of the exercise of that capacity that a corporation should act in that sense (III, pp 292-4).

30. Cf III, pp 293–4, where Scheidemantel requires confirmation of the by-laws of societies, regulation of the subscriptions of their members, the due rendering of accounts, and confirmation of their appointments of officers of their own, cf also II, pp 204sqq , on the necessary limitations and the proper police supervision of guilds, and III, p. 248, on the constitution, structure and government of local communities (which are instituted 'by command of the Sovereign', and must exercise their rights of legal coercion in his name)

Scheidemantel totally rejects any idea of autonomy [as belonging to societies] law is the declared will of majesty the rules of a privileged society are merely a matter of contract between its members, and they only acquire civil obligation 'when majesty arms them with obligation' (I, pp. 164–6) Customary law, he thinks, is often really a matter of wilful disobedience it generally arises through 'culpable heedlessness or malice', in any case it has no validity if it contravenes reason, or the purpose of the State, or law (I, p 225)

31 'No good prince, however, will take it for himself except in case of necessity' (III, p 293)

32 Thus Scheidemantel includes together, under the head of public societies, not only 'colleges' [of magistrates] which have been instituted for the purpose of exercising powers of government, but also churches, academies, privileged trading companies and local communities which the government has recognised as public, and in the same way he lumps together, under the head of private societies, the privileged as well as the unprivileged, and the simple (i e the relations of husband and wife, parent and child, and master and servant) as well as the compound (households, fraternities, guilds), III, pp 244–50. Elsewhere he treats schools and universities (II, pp 183sqq), academies and learned societies (ibid pp 194sqq), and guilds (ibid pp 204sqq), purely from the point of view of their being 'police' institutions of the State [i e institutions which enable the State to supervise the behaviour of its members]. He even makes 'domestic societies' subject to the general rights of majesty under which all societies have to live and move, III, pp. 249, 294–7. *Scheidemantel treats associations as State institutions*

33. In his *Staatslehre* (*Works*, IV, p. 403) Fichte remarks that the low view of the State which is commonly held may be seen, *inter alia*, 'in the zeal for liberty, i e. in lawlessness of acquisition, in the contention that churches, schools, trade-guilds and fraternities—indeed, almost everything that cannot *Fichte's similar view*

be expressly referred to civil legislation—are not State-institutions, but institutions proceeding from private persons', with which the State is only concerned in connection with its duty of protection. Fichte is especially concerned to make the guild a definite State-institution (with a fixed membership determined by the Government, and with tests of skill imposed by it, etc.), cf his *Naturrecht*, II, p. 58 (*Works*, III, p 233), and his *Rechtslehre*, II, p 555.

Kant on foundations

34 Thus we find Kant—especially in the appendix to the second edition of his *Rechtslehre*, I, no. 8 (*Works*, VII, pp. 120–3), 'on the rights of the State in the way of inspecting perpetual foundations on behalf of its subjects'—placing a definition of the *Stiftung* in the forefront of his argument. It is 'a voluntary beneficent institution, confirmed by the State, which has been erected for the benefit of certain of its members who succeed to one another's rights until the time of its final extinction' But [though he thus admits their continuous life,] he proceeds to explain that these 'corporations', in spite of rights of succession, and in spite of the constitution which they enjoy as *corpora mystica*, may be abolished at any time without any violation of right. When he comes to details, he applies this theory to benevolent institutions for the poor, invalids and the sick, to the Church as a 'spiritual State', to schools, to the nobility as a 'temporary guild-fellowship authorised by the State', to orders; and to foundations based on primogeniture [i e to what we should call entails or family settlements]

In another passage of the *Rechtslehre* (II, note B, loc cit p. 142) he starts from the idea that 'there cannot be any corporation in the State, or Estate, or order, which can transmit land as owner, according to certain rules, for the exclusive use of succeeding generations, *ad infinitum*' He proceeds to give as examples the 'order of knights' and the 'order of clergy, called the Church', but he also adds, as another and parallel example, 'pious foundations'.

35. Loc. cit pp. 120–3, 142–3

Kant's dislike of voluntary associations

36. It is the secularisation of 'commanderies' [the relics of the old Teutonic Order in East Prussia?], and of ecclesiastical endowments, which Kant more particularly justifies—and indeed not only justifies, but demands. Though he supports his demand by an appeal to the change in 'public opinion' which has been produced by 'popular enlightenment', it is significant that he thinks it a sufficient warrant for secularisation if the support previously given to endowments by 'popular opinion' has been withdrawn 'merely by the leaders who are entitled to speak on its behalf' (loc cit. pp 121–2, 142–3)

But Kant desires equally to eliminate the system of Estates, and more especially the hereditary Estate of the nobility, loc. cit. p. 123. He even denounces any separate institution or pious foundation for charity or poor-relief, arguing that the only proper system is one of State-provision, by means of regular contributions made by each generation for itself, in the form of legal and compulsory payments, loc cit pp. 120–1, 144 [Kant's argument —that each generation should meet its own problems, without the aid of the pious benefactions of the past—is characteristic of an age which was shaking off the yoke of a past which it supposed to be outworn, and proclaiming the right and duty of each generation *fare da se*, cf Paine's repeated phrase that 'each generation is competent for its own purposes', and compare also his scheme for the complete transference of all poor-relief to the State (*Rights of*

Man, Part II, c. 5) with Kant's similar proposal. Hegel, in his *Philosophy of Law*, §§242–5, speaks of the fortuitousness of alms-giving and charitable institutions, and praises, in comparison, a system of obligatory general regulations and orders. He is particularly critical of the boundless charitable foundations in England]

87. *J n. et g.* VII, c. 2, §§21–3 After dealing with these 'peculiar subordinate bodies', Pufendorf proceeds to treat of appointments to public offices [thus connecting associations with the working of the State]. *Pufendorf on associations*

88. Pufendorf makes an exception in favour of 'colleges' which *probari debent*, such as the Christian communities in ancient Rome Apart from this exception, he treats as *corpora illegitima* not only bodies which are formed for inadmissible objects, but also those which have arisen *absque consensu summorum imperantium*

Like Hobbes, he divides all *corpora* (including both the legitimate and the illegitimate) into the two species of 'regular' and 'irregular', according as there is a proper *unio voluntatum*, or some other bond of union (e g. *conspiratio* produced by *affectus*, *spes*, *ira* or the like).

89. Accordingly, in a State which has grown from the union of a number of bodies, these bodies must surrender to it whatever is necessary for it a State which allows bodies to enjoy independent rights in public matters is a State which renounces part of its *imperium* and becomes *irregularis et biceps*.

90. While the State is entirely and absolutely represented by its Sovereign, it is otherwise with 'bodies', here acts done by the *rector* (or *coetus*) who is entrusted with the *regimen corporis* can be deemed to be the *actio totius corporis* only when they fall within the corporate sphere, as duly delimited in accordance with the constitution and the laws Outside that sphere, the agents are personally liable. Pufendorf also regards a 'protestation' against the decisions of an assembly [i.e the defiance of a 'body' by some of its members] as permissible, and he holds that in a dispute between a corporation and its members *non corpus judex erit, sed civitas, cui corpus subest*

91. *J n et g* VI, c 1, §1 *Quemadmodum corpus humanum ex diversis membris componitur, quae et ipsa, in se considerata, corporum instar prae se ferunt—ita et civitates ex minoribus civitatibus constant*

92. Thomasius, however, confines the idea of *societas inaequalis* to the communion between God and man, and he divides merely human societies into *mixtae* and *aequales*. He does not, therefore, use the distinction of 'equal' and 'unequal' societies in determining the relations between the corporation and the State, cf *Instit jur. div.* I, c. 1, §§93–113. In a similar way we find Mullerus (*Instit* I, c. 1) Praschius (§§6–11) and other writers, employing this distinction only in order to point out differences of *internal* structure in the two sorts of society [and not in order to explain their *external* relations to the State]

93. Cf n. 156 to §16, supra: see also Pufendorf, *Elem* II, 6, §20 (where he applies the argument against guilds).

94 *Introd in jus publ univ*, *P. spec.* II, c. 4.

95. Loc. cit §7 n. *p.* If the Ruler tolerates *collegia injusta et improba*, these bodies have *effectus civiles*, but if he disapproves of them, even the justest of such 'colleges' (e.g the early Christian communities) are instantly destitute of all rights. *J H Boehmer on corporate bodies*

Their property

46. Loc. cit. §9 n. *r* More especially, these 'public colleges' must render accounts to the sovereign, and they cannot dispose of their property without his consent. This is the case with *bona civitatum, communitatum, academiarum, immo et ecclesiarum—quid enim aliud sunt quam coetus publici?*

Their power of legislation

47. Cf II, c. 3, §§16–28 and c. 4, §12 Boehmer ascribes legislative activity exclusively to the Sovereign, and he explains the legal validity of customary law, of foreign law [in cases of private international law?] and of 'statutes' [i e by-laws of corporations], by his having given them his approbation. He regards municipal self-government in general not as a right belonging to municipalities (*städtisches Recht*), but as a form of legislative authority delegated to *magistratus inferiores* The by-laws of *collegia et corpora* [i e corporate bodies other than municipalities], in regard to their own affairs, are in his view merely *pacta* among the members, requiring, as such, subsequent confirmation by the sovereign. But the sovereign may go further he may make even these by-laws [though they are only internal *pacta*] dependent on his previous sanction, and he is acting rightly if he does so In any case, he has the two rights of *inspectio* and *directio*. he can cancel by-laws which are an abuse, and he can, in general, prescribe the procedure to be followed in any respect

Their power of jurisdiction

48 Cf II, c. 3, §26, c 4, §12 n *u*, c. 7, §24, c 8, §13. *Jurisdictio* and the power of punishment belong only to the Sovereign or his delegates. *collegia* and *societates aequales* have no *jurisdictio* or *jus puniendi* They may appoint *arbitri* for themselves, but they can never appoint *judices* without being guilty of *majestas laesa*. They may determine by pact that there shall be certain 'conventional' punishments, but they must leave to the *Superior* the carrying of them into effect

Their power of imposing dues on their members

49 Boehmer argues (II, c. 9) that, while all 'societies and colleges' need a 'common chest', an *administrator* [or treasurer], and subscriptions from their members, there is a difference in this respect between the equal and the unequal society *in aequali societate obligantur membra ex pacto, in inaequali ex imperio.* The Sovereign alone has a right of taxation Any person other than the Sovereign who imposes a contribution must act either *ex imperantis indultu expresso vel tacito*, or *ex consensu subditorum* he can never act *suo jure* In case of necessity, however, the consent of a majority is sufficient [i e. it counts as the *consensus subditorum*], and Boehmer even allows that, *tempore extremae necessitatis*, a community [which would otherwise need the permission of the Sovereign] may act on its own authority—though he adds that this should rather be explained as proceeding *ex praesumta voluntate imperantis* See n 46 supra.

Their officers

50. According to II, c. 6, there can be no public office *nisi ab Imperante* In order, therefore, to appoint 'magistrates' for themselves [i.e. to appoint the officers of any society to which they belong], subjects require the permission of their Ruler If they choose *consules*, for example, they are acting *non suo, sed Imperantis nomine* they are therefore responsible to him, and he may deprive them of their right of appointing, and make his own nomination, if they abuse their right of choice. Indeed, the Sovereign cannot allow a right of free election without disturbing his 'majesty', and for that reason he generally requires that his sanction shall be necessary for all elections (§6 n *m*) We may notice especially how Boehmer, in dealing with the duty of municipal magistrates to render accounts—a duty which, he holds, cannot be effectively abolished by any prescription or privilege to the

contrary—bases it upon the fact that the municipal magistrates really conduct their administration as public officials, *nomine Imperantis* (§§ 7–8 nn *n* and *o*). He also holds that an officer of a corporation can never be legally prevented from appealing to the Sovereign (c 6, § 9)

Their privileges

51. Cf II, c 3, §§ 56 sqq., and esp § 64 n *b* Privileges which run counter to the public good—such as a *privilegium senatui datum de non reddendis rationibus de bonis civitatum*, or again a monopoly—are absolutely void Privileges which may become prejudicial in altered circumstances, as so many of the *privilegia collegiorum* readily may, are subject to recall.

52 Cf n 46 supra, and see also II, c 10 (esp §§ 7 and 17–18) on the *jus Imperantis circa ἀδέσποτα* [i e in regard to *res nullius*]. But he defends himself against the reproach that he is depriving towns of the ownership of their property by his arguments (c 6, § 8 n *o*, III, c 3, § 5 n *c*)

Boehmer on public and private law

53 *Introd in jus publ univ* c 2, §§ 9–10 In the following section (11) he argues acutely that on this basis international law is neither *jus publicum* nor *jus privatum*, inasmuch as *actiones gentium* fall into neither of the two categories [i e that of 'public' and that of 'private' actions] which are required by the conception of the State, but are simply *liberae* [On Boehmer's argument the actions of States when regarded as powers or *gentes* in the international system (or want of system) are neither private actions, done by private citizens or private bodies or the prince in his private capacity, nor public actions, done by citizens in their public capacity or the prince in his capacity of a public person They are *liberae*, or indeterminate So Boehmer seems to argue, but it is difficult to see why the *actio* of a *gens*, if the act is really that of the *gens* (and not, for example, that of a casual pirate in the West Indies, of English nationality, who happens to plunder a French ship), should not be regarded as an act of the *Princeps qua talis*, or of citizens *qua membra Reipublicae* We can hardly say that the *gens* is not the State But the use of the separate word *gens* in international law (like the use of the word 'power') has led to a divorce between the theory of international and that of internal relations, which is only slowly being abolished]

On 'public colleges'

54 He deals (II, cc 4 and 5) with (1) the *jus imperantium circa collegia et universitates* and (2) their *jus circa sacra* In dealing with the former subject, he refuses to allow that 'public colleges' have anything more than the status of 'private colleges' when regarded in their nature as *universitates* and compared with the Sovereign (e g they have not *jura reipublicae*, as he has, but only *jura collegiorum* they have not a *jus fisci*, as he has, and so forth). They are only *suo modo publica* ['public—in a way of their own'] in virtue of the Ruler having greater rights over them and their property than he has over individuals and their property [In other words, they are public in the sense of being under public control, but not in the sense of having a public position] Cf III, c 3, § 5 n *c*

55 *Jus publicum*, as Titius uses the term, includes only the relations of the *Imperans*, as such, to his subjects.

56. Cf. e g Daries, §§ 661–3.

Huber's classification of universitates

57. In the second book of his *De jure civitatis*, which is devoted to the rights of the subject, Huber proceeds—after dealing first with persons in general (s 1, c 1), then with the family (s 1, cc. 2–6), and then with citizens (*Bürger*) and the differences among them (s. 2)—to treat, in sect. 3, *De jure universitatum*. Under this head he discusses the *universitas in genere* (c. 1), guilds and trading companies (c. 2), universities (c. 3), religious societies (c. 4), local

communities (c. 5), the responsibility of *singuli ex facto universitatis* (c. 6); and the hierarchy of the Roman Catholic church (c. 7) He follows a similar order in *Instit Reip* sect. II

58. *De jure civ.* II, 3, c 1, §§3 and 19. He remarks, however, that the name of *societas* is often given to bodies *quae maxime sunt universitates*, and he cites the East India Companies in Holland as examples

Their definition and their powers

59. *De jure civ.* II, 3, c. 1, §§10–14, 24 Huber's full definition of the *universitas* is *coetus sive corpus subditorum alicujus civitatis, sub certo regimine, permissu summae potestatis, ad utilitatem communem sociatus* The *regimen* of a *universitas* may be conceded (as it is in the State itself) to one or more persons, or to the majority of the members (§20), but the concession must always be limited [as regards 'universities' other than the State] to the narrowest scope of action that necessity will permit, in order that the power of the State may be weakened as little as possible (§34). *Universitates prohibitae*, even when they are actually tolerated, exist only *de facto*, and not *de jure*, but a period of toleration has the effect of tacit approbation (§§26–30) Associations which are not for the real benefit of the *socii* or the State are to be suppressed (§§31–3).

Their authority derived from the State

60 Huber, *De jure civ.* II, 3, c. 6, §§9 and 19–20 *potestas rectorum universitatum pendet a tenore mandati quod habent a summa potestate, a qua jus suum habet universitas* The rectors do not 'represent' the *universitas*: they have no *praefectura* other than what is derived from the Sovereign: *quod agunt, non ad mandatum populi, sed Principis, exigendum est*

He uses similar language in *Prael Dig* III, 4, no 4. *universitates respublicae subordinatae* cannot appoint permanent representatives, because they are unable *modum et finem potestatis concedere suis rectoribus, sed ..quidquid habent juris id accipiunt ab eo penes quem est summa potestas; proinde qui id genus universitatis praesunt, non repraesentant populum universitatis, sed potestatem summam cui parent* Corporations may therefore give an authorisation in a particular matter of legal action, which has a binding effect on those who consent, but they cannot vest their officers with a general power of binding the whole corporation (which explains, *inter alia*, the *lex 'Civitas'*), cf. *De jure civ.* II, 3, c. 6, §§3sqq and *Prael* III, 4, no 4. Nor can corporations devolve on their officers a *jus contribuendi* (*De jure civ* II, 3, c 6, §18), or a *jurisdictio* (ibid. §21), for any jurisdiction that they have is derived from the State (ibid III, 1, c. 6, §8). Finally, they can only make by-laws if they are authorised to that effect, and subject to the sovereign's right of giving his sanction (ibid. I, 3, c. 6, §§59sqq., II, 3, c. 2, §§25sqq., III, 1, c. 2, §§14–17).

Schmier's theory of corporations

61. Schmier, *Jurisp publ univ.* V, c. 1, nos. 87–114, where, after an account of the *universitas* in general, there is a discussion of local communities, universities, guilds and trading companies Schmier expressly bases the requirement of State-concession on the ground that *regimen, imperium seu jurisdictio ad universitatem constituendam necessaria nequit ex alio fonte quam summae potestatis largitate in inferiores derivari* (no 92). When he comes to details, he makes a grant by the State the source of the corporation's right of choosing officers, administering property, imposing taxes, exercising jurisdiction, and generally enjoying autonomy and self-government, cf V, c. 2, nos. 53–64, and also c. 3, nos 69–79.

62 Ibid. III, c 3, no. 20.

Similar theories

63 Cf. e g Kreittmayr, *Grundrisz*, §19. Subjects may form 'particular societies', but such societies enjoy *jura communitatis* only in virtue of the assent

of the State, and they are thus subject to a *jus supremae inspectionis et directionis* on the part of the territorial prince We may also note that even Pufendorf's ideas, and still more those of Hert, are partially in agreement with this trend in the natural-law theory of society

64. See n. 6, supra.

65 *Instit* §§838–9 Wolff adds, in §849, that it is only societies whose objects are inadmissible which give rise to no rights and duties

66. *Instit* §846 The laws of a society are prescriptions relating to matters 'which must always be done in one way, and that only, if the purpose of the society is to be secured'. 'All societies, therefore, must have laws, and enjoy the right to make laws' they have also the right of threatening punishment and of actually punishing offenders Each new member promises, expressly or tacitly, that he will observe the laws, but since the laws of a society retain their authority by virtue of the consent of its members, the society has the power of abrogating or amending its laws, or of making new laws Cf §853. *Wolff on the inherent rights of societies*

67. Wolff finds a justification for requiring the Ruler's assent to the alienation of the property of a local community in the fact that it is incumbent upon him to see to the common interest, and, again, that he has a *dominium eminens* over such property—as indeed he has over all kinds of property (*Instit* §1129)

68. S. Cocceji, *Nov syst.* IV, §280 *constituitur tale corpus consensu* cf §205, on the principle of *par ratio* as between all *corpora et universitates* and the State [i e what is true of the State is equally true, or no less likely to be true, of corporations]. *Similar views in other German writers*

69. Heineccius, *Elem jur nat* II, §§13–25. The basis of the State's authority over corporations is the natural-law principle that, while in every society 'the well-being of the society is the supreme law of its members', the 'utility' of the 'greater society' must take precedence, in a 'compound society', over that of the 'lesser societies' contained in it

70 Daries, *Instit jurispr univ Praec* §§17–23, *P spec* §§550–6, 674–8 He derives the existence of associations from the contract [by which they are formed], but he bases the authority [of the State] over corporations on the principle that in a 'compound society' the relation of the *subordinata* to the *subordinans societas* is like that of the *socius* to the *societas*, and therefore the interest of the 'greater society' takes precedence in the event of a clash of interests (§§554sqq) He therefore includes among the *jura majestatis* the *jus efficiendi ne societates partiales fini utilitatique civitatis sint impedimento*, and (consequent upon that right) the further right of legitimising as 'just' such societies as are compatible with the purpose of the State, and of abolishing others as 'unjust' (§§674sqq)

71. *Syst nat* §§327–47 A similar view reappears in the *Jurispr pos* §899; but in §853 a distinction is drawn between (1) *jura universitatis*, whether *originaria* or *contracta*, and (2) rights which belong to *magistratus constituti in universitate ex concessione Superioris*, and are therefore exercised by them in the name of the State, and not in virtue of their representing the *universitas* *Nettelbladt's theory of associations*

72. In his *Syst. nat.* Nettelbladt first classifies societies by their purposes (§348), and then proceeds to arrange them, by a variety of criteria, into *naturales et non naturales* (§349), *simplices et compositae* (§§350–1), *perpetuae et temporariae* (§352), *licitae et illicitae* (§353), and *aequales et inaequales* (§§354–61). *Their classification*

'Equal societies' possessing authority

78. To the category of *societates* which are *aequales* and also (if only in cases of doubt) *cum potestate*, there belong both (1) *collegia*, or *societates simplices plurium quam duorum membrorum*, and (2) *corpora*, or *societates compositae*, the members of which are themselves 'colleges' (§354) In these *collegia* and *corpora* there are present certain peculiarities—which do not, however, prevent their being included in the category of *societas aequalis*—such as a *directorium societatis* (§357), a *peculiare collegium repraesentativum* (§358), and *deputationes collegii* for particular issues (§359).

74. *Syst. nat.* §361.

The inherent rights of associations

75. The *jura socialia societatis* which appear in Nettelbladt's theory are the admission and exclusion of members (§§364sqq and 407), the appointment of *imperantes*, *directores* and *officiales* (§367); the power of disposition in regard to their own assets (§407), the right of meeting and making decisions (§§374sqq), autonomy (§§398–9), a *potestas judicandi* in regard to the affairs of the society (§413), self-government, including the right of self-taxation (§407); and finally the right of disposing of the property of the society—though the property itself is [not an inherent right, as the right of disposing of it is, but] a *jus societatis contractum* (§396). Only as regards equal societies possessing *potestas* does Nettelbladt assign all these *jura socialia societatis* to the society itself In the case of equal societies without *potestas*, they belong to a third party in the case of unequal societies, they belong to the *imperans* or *superior* On the other hand, he regards the ownership of the property of the society as belonging in case of doubt—even in the two latter sorts of society [the equal society without power, and the unequal society]—to the community itself, and not to the person who wields authority (§396).

The compound society

76 In an earlier passage of his *Systema naturale*, where he is seeking to determine the nature of the *societas composita*, Nettelbladt deals with the inclusion of 'moral persons' in a higher unity as its 'members', but he draws attention to the facts (1) that it is not *all* the societies within a society which are members of it, and (2) that not *every* society whose members belong to other societies is a 'compound society' (§§350–1) He proceeds, in the same context, to distinguish between (1) the position of a *corpus* composed of *collegia* which have social objects of their own, and (2) the position of a *collegium* divided into mere 'deputations' or sections (§359) In a later passage, where he is dealing with the theory of *membra civitatis*, he treats in some detail of the position of 'moral persons' as members of the State (§§1588 and 1226–50)

Public societies in the large sense

77 *Syst nat.* §§1227–30, where he includes among the 'public societies which are eminently such' *collegia seu corpora ordinum* and *collegia optimatum*, but *not* the *collegia senatoria* in a democracy.

Colleges of magistrates

78 Ibid §§1231–4. On the other hand, these 'societies which are magistracies' [i e administrative or judicial Boards] may possess the *jus magistratus* itself [not as of right derived from the sovereign, but] either *jure proprio* or *jure administratorio*, and they may in addition acquire special privileges.

Public societies in the strict sense

79 Ibid. §§1235–7. In this case [i e. as regards 'public societies strictly so called'] the place of the *jus magistratus* is taken by a *jus ad certas functiones, regimen reipublicae concernentes, obeundas absque corrigendi potestate.*

Local communities

80 Ibid §§1238–40. These *universitates personarum* [such as territorial communities] may be either *ordinatae* or *inordinatae*: they may, or may not,

have magistrates of their own, and they may be governed either by a *collegium* or a *persona* *Circuli* [the German *Kreise*, roughly analogous to our English counties] belong to this category, but 'circles' which are the member-States of a federation are themselves *systemata Rerumpublicarum*

81. Ibid. §§ 1241–2, 1247, 1250 In any case of doubt, we can only regard the society itself as the 'Subject' or owner of this authority, but an individual, or a part of the society, may also be such a 'Subject' (§ 1245) *Private societies*

82 Ibid §§ 1243, 1247, 1249–50 Nettelbladt does not go into any further details about the extent of State-control over corporations when he is dealing with Natural Law It is from positive law, and from such law only, that he seeks e.g to derive the limits upon the rights of local communities, churches and families to alienate property, *Jurispr pos.* § 903. *State-control of corporations*

83. Ibid §§ 1243–4.

84 Ibid. §§ 1245, 1248. It goes without saying that this argument refers primarily to the position of the evangelical church in Germany

85. Achenwall, *Jus Nat*, *Proleg* §§ 82, 91–7, and II, §§ 2 sqq On this basis Achenwall too makes every contract between more than two persons for the formation of a society produce a *jus sociale universorum in singulos* (II, § 8), and he regards a *societas aequalis* as one in which this *jus*, or social authority, remains with the whole community, and nothing more than a *praerogativa*, or a *praecipua obligatio* (in any case nothing in the nature of an *imperium*), is vested in a single person or body of persons (II, §§ 22–31). *Achenwall on the social authority of associations*

86. Hoffbauer, *Naturrecht*, pp 190 sqq, where a distinction is drawn between 'essential' (*immanentia*) and 'incidental' (*transeuntia*) rights of societies, and where 'social laws' and 'social authority' (in its three species of directorial, executive and inspectorial) are treated as being essentially involved in any contract for the formation of a society. Hoffbauer also speaks of societies as having officials of their own—but not, he adds, independently of the Ruler, and he differentiates 'equal societies' in which all the members must concur from 'unequal societies' in which there is not such general concurrence *The views of Hoffbauer*

87 Ibid p 288. But Hoffbauer adds that these 'private societies' cannot employ any coercive authority to vindicate their rights against their members.

88. A L von Schlözer, *Allg Staatsrecht*, p 70, § 19, VIII Schlozer cites as examples 'musical clubs' and 'the Church'[1]

89. W. von Humboldt, *Ideen*, pp. 41 sqq, 83, 113 sqq, 115.

90 It is sufficient to refer to the way in which Mevius (*Prodromus*, V, § 19) eulogises 'subordinate societies' as the foundation and mainstay of the State The most important task of politics, he urges, is concerned with *bona familiarum* and with *corporum, collegiorum, urbium formatio*, the prosperity of civil society and that of its contained groups are mutually dependent on one another; and there must be a happy mean between the independence of corporate bodies and their subjugation to the political Whole On the basis of these ideas he will not refuse liberty of meeting and association *simpliciter*, but only when there are *causae publicae, curae imperantium c* ·*ditae* (V, § 26) We may also remember the views of Leibniz [cf supra, n 6]. *Mevius in praise of groups*

91. Montesquieu, it is true, regards the monarch as source of all authority, but he also believes that constitutional governm , and therefore true monarchy, is impossible unless authority is diffused through *canaux moyens*, and thus made, as it were, to flow into a Delta of *pouvoirs intermédiaires*

Montesquieu on the need of intervening powers between the State and its subjects

subordonnés et dépendants. There is therefore need for the prerogatives *des Seigneurs, du Clergé, de la Noblesse et des Villes*, as well as for political bodies (i.e. *parlements*) to declare and preserve the laws (*dépôt des loix*). Any destruction of these intervening powers must produce, if not a Republic, at any rate a despotism, as was shown, for example, in the case of Law's operations in France [1716–20] and in the conduct of Ferdinand of Arragon. See the *Esprit des lois*, II, c. 4, cf also III, c 7, V, cc 9–11 (where Richelieu is criticised), VI, c 1 and VIII, c 6, and cf the argument, in V, cc 14–16, that despotism, as distinguished from monarchy, is based on uniformity, equality, centralisation and the lack of all qualifying and moderating elements

Moser's eulogy of the old Germanic Groups

92 We need only refer to the account which Möser gives in his *Patriotische Phantasien* of the struggle of towns and guilds and leagues for liberty (I, nos. 43, 53, 54), and to his glorification of the Hansa (I, no 45, III, no 49) In the course of this glorification he hazards the remark that if 'the towns and guilds and leagues' had won the day in their struggle with the territorial principality, there would be sitting to-day at Ratisbon, 'side by side with an insignificant Upper House a united body of associated towns and communities for dealing with the laws' which their forefathers once imposed on all the world, and then 'it would not be Lord Clive, but a counsellor of Hamburg, who would be issuing his commands on the Ganges' (I, no 43).

We may also note Möser's historical accounts of the glory and the decline of fraternities and guilds (I, nos. 2, 4, 7, 32, 48, 49, II, nos 32–5), and, more especially, his disapproval of the attack made upon them by the Recess of the Imperial Diet of 1731 (particularly in regard to the obligations of honour* imposed by craft-guilds, I, no 49) We may equally note his general derivation of the constitution of the [German] territory, or *Land*, from a union of the 'Fellowship' type between free proprietors of estates, followed by an analogous process of Fellowship-formation among manumitted serfs and freemen who were not proprietors (In this last connection there are several passages in Moser which deserve notice, e g in III, no 54, he refers to the institution, by lords of manors, of 'a mutual protection society and articles of fraternity' among the peasantry, who then institute 'articles as between themselves' for their own domestic concerns † Again, in III, no 66, he treats of 'the origin and advantage of what are called *Hyen*, *Echten* and *Hoden*' among free men who have not a plot of land of their own cf p 353, where he remarks that 'such a *Hode* was something in the nature of a guild chartered by the State, which could freely pass a rule about itself, and by such means maintain the rights of free men', cf also IV, nos 63–4)

Finally, we may also refer to Moser's account of the origin of territorial Estates from leagues and confederations, and of their development into a body which represented the whole territory as a *Landschaft* [or local Diet], IV, no. 51

Möser on liberty of association

93 Ibid II, no 2 and III, no. 20 'every civil society, great or small', should 'properly be a legislature for itself', and should not form itself on a

* The German is *Handwerksehre*. The guilds imposed standards of decent work Hegel in his *Philosophy of Law* (§§249–54) speaks of society as assuming a moral character in corporations, and of the individual as having his 'honour' in and through his corporation.

† This may remind us of the 'frith-guilds' and the later 'frank-pledge' in our own

general plan or on philosophical theories Cf also IV, no 41 ('each *Gau* and *Hof*' [or, as we might say, each hundred and manor] had of old 'its own autonomy'), and III, nos 54, 66

On towns, guilds and rural groups

94. For Möser's views in regard to towns, cf I, nos 43, 53, III, no 20 (every small town ought to have its own particular political constitution), and I, no. 39 (where he opposes the exemption of the servants of country-landowners from civic taxes) For his views about guilds, cf I, nos 2, 4, 48–9, II, nos 32–5, and as regards rural communities, cf II, no 1 (on the sovereign right of each peasant community to exclude strangers and sojourners) and II, no 41, III, nos 43, 52–3

Proposals for new associations

95 Cf. e g the proposals for the founding of a company for world-trade by the united towns of Germany (I, no 43), the founding of a separate college of advocates [like our Inns of Court] with an exclusive corporate constitution (I, no 50), the founding of a 'circle-association' for putting a stop to distilling in the event of a shortage in corn (I, no 64), the starting of a company for conducting trade in corn on the Weser (I, no 52), etc

96. Loc cit III, no 20, p 71.

97 *J n et g* VII, c 2, §§21–2, cf nn 37–40, supra

Pufendorf on the rights and duties of corporations

98 Pufendorf deals with corporate property in *Elem. jurispr univ* I, def 5, §§5–6 *Propria sunt non solum quae ad personas singulares pertinent, sed et quae ad personas morales conjunctas seu societates qua tales* Neither third parties, nor the members themselves when they are not 'conceived as the whole society', own any right in such common property But in addition to common property of this description, which is in the *plenum dominium* of the society, a society may also possess property of another description, where the 'use' belongs to 'individual members' (*singuli*)—and indeed (Pufendorf adds) there are many cases of such property where the use is open also to *extranei*

Pufendorf also deals (*Elem* II, def 12, §28, *J n et g* VII, c 2, §22 and VIII, c 6, §13) with obligations incurred by a *corpus* in consequence of the legal transactions of its *rector* or *coetus* He assumes, like Hobbes, that in such cases the corporate property is liable for the satisfaction of the claims of its members, but where the claims of third parties are concerned, he holds that the individual members are responsible, each of them *pro rata*—though if there be refusal to discharge a claim, each can be made responsible for the whole amount

Finally, he deals with *delicta universitatum* (*J n et g* VIII, c 3, §§28–9, *De off hom et civ* II, c 13, §19) He expounds the usual theory, but he suggests that innocent individuals should not be included in any punishment, and that all punishment should cease with the disappearance of the persons who were concerned in any given delict He justifies the latter suggestion on the ground that, though there are certain attributes, such as possessions or rights, which belong to the *universitas per se*, there are others, such as learning or moderation or courage, which cannot be ascribed to a *universitas, nisi ex derivatione a singulis* To be deserving of punishment is an attribute of the second kind, for a *universitas*, 'as such', has no *animus merens poenam* ['no intention deserving of punishment'] [Cf Grotius, supra, n 52 to §15]

99. This is the view we find in Thomasius, Treuer and Titius, cf n 131 to §16

100. Cf. pp. 121–3 supra Gundling's *dissertatio de universitate delinquente* (cited by him in his *Jus nat* c. 36, §§23 and 26, in order to prove the impropriety of the punishment inflicted by Poland on the city of Thorn) belongs

to the literature of criminal law, and can only be discussed in connection with it

Gundling's confusion of corporation and partnership

101 Cf nn. 160 and 163 to §16. Gundling, in dealing with the *contractus societatis*, or, as he calls it, 'mascopey', and in treating of *communio incidens* [i e 'quasi-society', as Wolff terms it, n 163 infra], uses Roman law as the basis of his argument (*Jus nat* c 23, §§61–3) But (1) he treats a society as being a single 'Subject' or owner of rights, and (2) he regards as contrary to Natural Law the positive-law rules which make it improper for a society to agree to exclude suits for the division of its common property, or which treat the death of its members as producing its dissolution (c. 25, §23)

102. Cf. nn 58 and 59 to this section cf also Huber's *Prael. Instit* II, 1, no. 7 (*civilis hominum societas, quae nec familia sit nec libera Respublica*), and *Dig* III, 4, no 1.

103. *Dig* III, 4, no 1, XVII, 2, no 2, *De jure civ* II, 3, c 2, §2

Huber's use of the term universitas

104 Thus a university *is* a *Universitas*, but gymnasia and elementary schools are not, because they have no *regimen certum*, *De jure civ* II, 3, c 3, *Dig.* III, 4, no 2. In dealing with groups of the type of the local community (*universitates familiarum*), Huber treats *vici* which have no magistrates of their own as not being *universitates*, even though they have common property, and he takes the same view of provinces, when they have no separate constitution, with provincial Estates of their own, but are directly administered by a prefect (*De jure civ.* II, 3, c. 5, nos 4, 18–22, *Dig* III, 4, no 2)

105 *Collegia magistratuum* are not *universitates*, for they do not possess a *scopus et usus a summa republica diversus et coeuntibus peculiaris* (*De jure civ* II, 3, c 5, §23).

His Collective view of corporations

106 This idea of a purely 'collective' (or 'bracket') Group-personality appears in Huber's theory of the *res universitatis* (*Prael Instit* II, 1, nos 4, 8), and of other forms of corporate property (*De jure civ* II, 3, c 1, §35) It also appears in his theory of the legal transactions of corporations, and more especially in his view of the obligations which a *universitas* can incur. Here, in the usual manner of his time, he refuses to recognise that a *universitas* can be bound by contract, except when *omnes et singuli* have given a formal assent, or when its representatives have been acting within the terms of a specific mandate otherwise, he confines the liability of a *universitas* to cases where it has profited by some transaction [i e where there has been a *lucrum emergens*], and he takes the general view that an *obligatio universitatis* entails a proportionate or 'limited' liability of all its members (as being the *partes ex quibus totum componitur*)—cf *De jure civ* II, 3, c 6, §§1–18, *Dig* III, 4, no 4

We find the same idea of a merely 'collective' Group-personality in Huber's theory of the delicts of a *universitas* (*De jure civ* II, 3, c. 1, §§39–43, c. 6, §13, *Dig.* III, 4, no. 5), and of its capacity for being represented in a suit at law (*Dig* III, 4, nos 4, 6) A similar trend appears in his treatment of the validity of majority-decisions While he derives it from the 'social' or partnership element in a *universitas*, on the ground that the principle may have been agreed upon beforehand [by each individual partner] in the society, he also limits its application strictly, and that on the very same ground—e g he holds that it is only the [individual] *consentientes* and their heirs who ought to incur liability in virtue of an obligation [arising from a majority-decision] (*De jure civ* II, 3, c. 6, §§23–4)

Huber emphasises, again and again, the identification of the 'collective

person' with the sum of the members *Ipsa universitas est persona* (ibid c 1, §36) *ipsum corpus sociatorum est universitas, non forma conjunctionis, ut aliqui argutantur* (*Instit* II, 1, no 7)

His view of the authority of corporate bodies

107. See n 60 to this section. Huber accordingly refuses to recognise any real autonomy of a society (*Instit* I, 2, §§5, 12) It is not, of course, inconsistent with this that he should regard it as possible for a *universitas* (like any individual subject of a State) to possess not only *dominium*, but also *imperium, outside the State* He concludes, however, that [though this is possible] it is not really the case with the *Societas Indica* [the Dutch East India Company], for the Company only exercises an *imperium* belonging to the United Provinces *De jure civ* II, 3, c 2, §§14–21, cf also §29

His view of the relation of partnerships and corporations

108. The only distinction which Huber draws between *societates* and *collegia*—bodies which he regards as in other respects very similar to one another—is that the majority-principle is the rule in the latter, and the exception in the former If, therefore, the rule of the majority is introduced into it by an agreement among its members to that effect, a *societas* is thereby transformed into a corporation It is thus that *societates* are often raised to the position of *universitates* (*jure universitatis donantur*) this is what happened to the Roman companies of tax-collectors, as it has also happened to modern colonial and trading companies, *quae, quum primo fuerint Societates, deinceps in formam Collegiorum reductae sunt, nec aliter administrari possunt* (*De jure civ.* II, 3, c 2, §§2–13, *Dig* XVII, 2, no 2)

109 Vide supra, n 60 to this section

Schmier on the universitas *and its members*

110 A view like that of Huber appears in Schmier see n 61 supra, and compare what he has to say about the *jura universitatis* (*Jurispr publ univ* V, c 2, nos 52–64) and the *delicta universitatum* (ibid III, c 2, nos 95–104) with his argument about the rights and duties of a *universitas* in regard to its members (ibid V, c 3, nos 69–86) In dealing with this last topic, he speaks of the members as being in a position of dependence which obliges them to render obedience and loyalty, but as having a corresponding claim on the society to promote their prosperity and to protect them, and he explains both the position and the claim by the fact that the authorities of the corporation *summam Potestatem repraesentant, atque in illius virtute et participatione mandata et judicia imponunt*

We may also note the fusion of a natural-law theory of *societas* with a Roman-law theory of corporations in Micraelius (I, c 7), Felwinger (pp 908–24), Knichen (*Opus pol.* I, c 5, th 1–15), and Kreittmayr (*Grundrisz*, §§11, 19)

The results of Huber's views

111 This result is already to be seen plainly in Huber He expressly says that *jus quo universitates utuntur est idem quod habent privati* (*Dig* III, 4, no 3), and he uses very plain language in enunciating the view that the inherent rights which a *universitas* can claim for itself are limited to matters connected with its possessions (*causae patrimoniales*) (cf *De jure civ* II, 3, c 1, §38) When he deals with the public-law rights of a corporate body, he makes them belong not to the *universitas* itself, but to its officers as representing the public authority

Boehmer bases the corporation on the societas aequalis

112 J H Boehmer, for example, uses the conception of the *societas aequalis* in order to justify the status of the *collegium seu universitas* as *una persona moralis*, and to prove the identity of this collective person through all the changes in its membership He goes on to make this conception the basis of his theory of the possessions, the debts, and the legal transactions and

delicts of the *universitas*. indeed he makes it the basis of a general distinction between *omnes conjunctim sumpti* and *singuli*, which he uses again and again in connection with all these points (*Introd in jus publ univ.*, *P spec* II, c 4, § 1 n. *i*, § 3 n. *l*, c 10, § 5 n *pp*)

113. See pp. 171–3, supra

114. See, as representing this whole line of thought, Nettelbladt, *Syst. nat* §§ 1238–40 and Hoffbauer, p 288.

115 Montesquieu, on the other hand, while he takes an 'institutional' view of corporations, champions their cause, cf. n. 91 to this section

The corporation confused with the foundation

116 This is the case with Turgot (n 15 to this section), and the same failure to distinguish between corporations and foundations appears in the debates of the National Assembly (see nn 20–3 to this section) We may also trace an unconscious transition from the idea of a society as being an association to the idea of it as being a State-institution or foundation in the theory of Scheidemantel—and this notwithstanding the fact that he interprets all groups as 'associations' (without seeking to distinguish between *societas* and corporation), and that he bases all the rights and duties of groups on a contract between their members. cf. III, pp. 244sqq.

117 See above, pp 168–9

118 This is particularly the case with W. von Humboldt, *Ideen*, p 129

Huber recognises bodies which are not universitates *as moral persons*

119 See n. 128 to § 16 In particular, we find Huber expressly arguing that *vici* without magistrates of their own cannot be *universitates*, even when they have *res communes, et earum nomine agere et convenire possunt ut personae*, for these rights, he contends, may be exercised wherever there is simple co-ownership [i e the co-owners may act and meet in respect of what they own], whether or no there is also a *societas* (*De jure civ* II, 3, c. 5, § 4) [Just as he allows some rights of acting and meeting to a village which is not a *universitas*, so] Huber would also allow merely tolerated societies (e g Anabaptists and Arminians) to enjoy the rights which are necessary for their continued existence, although they are not *universitates* e g they should have the right of entering into contracts, though not that of receiving legacies (ibid III, cc 8–9, *Dig.* III, 4, no 3)

120 See nn 154, 162 and 165 to § 16

121. See nn. 155, 166 and 167 to § 16

Extension of the connotation of the moral person

122 On the extension of the conception of the 'collective person' in Hert and Gundling, see nn 160 and 163 to § 16 It is also instructive to notice the line taken by Huber, when he is seeking to find the differentia of *societas*, as contrasted with *universitas* (This is a task which he essays in the course of an exposition of the *contractus societatis*—an exposition which is made to include a theory of the partnership in property between husband and wife, under the name of *societas conjugans*) He entirely avoids the pit-fall of making the differentia consist in the absence of moral personality See *Dig* 17, 2, nos 2–13, and see also nn 108 and 119 to § 16.

Boehmer, too, [makes no sharp distinction between *universitas* and *societas*, he] distinguishes a *universitas* from a *societas negotiatoria* only by the fact that it is not instituted *ad commune lucrum et quaestum*, cf *P spec* II, c 4, § 1 n. *i*. Scheidemantel, in much the same way, applies the conception of the 'composite' person to families and partnerships also [as well as to corporations proper], III, pp. 244sqq.

123. The fundamental ideas [of this Fellowship theory] were expressed in England by Locke, II, c. 8, §§ 95–9

124. The fact that he even manages to establish a relation of this order between 'natural' and 'positive' feudal law shows how far Nettelbladt could go in this direction

125 Cf supra, pp 124–6sqq, and nn 170sqq to § 16 Nettelbladt accordingly makes the distinction between the *status internus* of a society and its *status externus* (§ 334) the fundamental basis of his theory of corporations Achenwall goes even further in drawing a hard and fast distinction between the *internum jus* of a society (II, §§ 6–13) and its *externum jus* (ibid. §§ 14–22) in the one case [i e as regards *internum jus*], he only employs the idea of a *nexus juridicus socialis*. in the other, he uses that of a *persona moralis* *Distinction of the internal and the external position of groups*

126 See nn 65–70 to this section, and also nn. 75, 81 and 85–6

127 Wolff, *Instit* §§ 841, 846, Heineccius, § 14, Cocceji, § 280, Daries, § 762, Nettelbladt, §§ 336sqq, Achenwall, II, §§ 24sqq, C von Schlozer, *De jure suff* § 3; Hoffbauer, pp 187, 192

128 Cf nn 175, 178, 181 to § 16

129. Wolff, *Instit* §§ 979sqq, Nettelbladt, §§ 338–9, Achenwall, II, §§ 32–9, Hoffbauer, pp 192–3 and 205sqq

130 The argument of Achenwall deserves special notice in this connection (II, §§ 24–8) All the members of a *societas aequalis* have identically the same *jus ac obligatio* therefore the 'common consent of the members' must determine the means which are necessary for achieving the end of this society, and where this common consent has not been given and declared in the original pact itself, it has to be expressed in *conclusa* formulated subsequently to the pact Inasmuch, however, as all the members cannot always assemble and give their consent to these later *conclusa*, an agreement (*lex societatis pactitia*) is made at the time of the initial institution of the society, determining the proper procedure to be followed in the future the *modus consentiendi validus* thus comes to be fixed in advance, the rules of precedence which may have to be followed, and the method of counting a majority of votes, are agreed upon, etc A similar argument appears in Wolff, *Instit* §§ 841 sqq (on the methods of 'common consent'), Nettelbladt, §§ 374sqq, Hoffbauer, pp 199sqq. *Achenwall on the basis of majority-decisions*

131 Nettelbladt, §§ 363–6 The reception of new members is an act whereby the *societas*, in virtue of the *jus societatis sociale*, declares that an *extraneus* who desires to be a member is thenceforth to count as such It is an act which alters *status* [i e the existing system of relations in the society], and therefore modifies rights and duties [for all the old members], to an extent determined by the purpose of the society [e g. the higher the purpose, the greater will be the change which an increase of the number of members makes in the existing system of relations and the existing rights and duties of members] No particular rules can be laid down in regard to the quality and quantity proper to the members of a society, all that is needed is *voluntas recipiendi* and *voluntas societatis recipientis*, the contract [by which a new member is received] is a valid contract even when, as is the case among the freemasons, the candidate does not know the exact object of the society, but knows that it is a permissible object. Cf. Wolff, *Instit* §§ 836–7 and 846, and cf also the views of S Cocceji (III, § 105) on the *status collegii* [the system of relations existing in an association] which regulates participation in corporate rights, and on the *actio praejudicialis* which members have given them for the protection of such rights. *The reception of new members into a society*

Expulsion or resignation from a society

132 Logically enough, Nettelbladt refuses to recognise either a right of the member to quit a society freely, or a right of the society to expel a member by its own exclusive action, and he will only allow exceptions to be made in either respect *vi juris necessitatis ob collisionem officiorum* ['under duresse of the law of necessity, in cases where there is a conflict of duties'], cf. §§368–70 and *Jurispr pos* §855 Hoffbauer takes the same line, pp 198–9

Wolff, on the other hand, is willing to allow a member to quit a society if there is no agreement to the contrary, provided that it is not to the detriment of the society, indeed, he is even willing to allow it—provided that an *idoneus* is substituted—in cases where there is an express agreement that a member shall not quit a society without its assent Conversely, he holds that a society has always the right to expel a negligent or hostile member (§§852–3). Heineccius holds that any *societas* lasts only as long as there is *consensus*, and a member is therefore always free to quit (II, §14) According to Achenwall (II, §§12–13), a *universitas* has the right and duty to coerce or expel a member who offends against the agreement on which it is based, and, conversely, members have a right of coercion or resignation as against a *universitas* which adversely affects their rights.

133 Nettelbladt, §§362, 367, 371 See also his *Jurispr pos* (§§856–9 and 876) on the rights and duties of the officials of an association in positive law, on the responsibility which officials incur in consequence of their *administratio*, and, more particularly, on the position of the *syndicus* of an association

134 Nettelbladt, §§83 and 372, and *Jurispr pos* §§846 and 865 Heineccius takes the same view, II, §§20–1, and so does Achenwall (*Proleg* §93)—with a reservation, however, in favour of those exceptions to the general rule [that corporations have the same rights as individuals] which arise from the *diversa hominis individua et societatis natura*

Analysis of Nettelbladt's method of dealing with associations

135 Under the head of *jurisprudentia naturalis generalis socialis*, Nettelbladt treats first of the *generalissima de societatibus principia*—of the general conception of associations, and their origin, end, status, authority, kinds and members (§§326–71) He then deals with the application to *societates* of the rules of Natural Law which relate to *singuli*, discussing such application in detail with reference to *actiones, res, leges, negotia, jura, obligationes, possessio vel quasi*, and *remedia juris* (§§372–414)

Under the head of *jurisprudentia positiva generalis* (*Jurispr. pos* Book II), he begins by remarking (§846) that the rules which have been previously stated with regard to *singuli* (Book I, §§5–845) are also applicable to *societates personarum* He then proceeds to treat of *universitates personarum* in general (sect 1)—dealing with their different species (tit. 1), with their *potestas, directorium* and *officia*, and, more especially, their *munera* (tit 2), and with their membership (tit. 3) Next, he treats (in a somewhat different order from that followed in his treatise on Natural Law) of the application to *universitates* of the positive-law rules relating to *singuli*. Here he deals first (sect 2) with the theory of persons (tit. 1), things (tit 2) and actions (tit. 3), he then deals (sect. 3) with *leges et actus juridici*, he proceeds (sect 4) to *obligatio* (tit 1), *jura* (tit. 2) and *possessio* (tit 3), and he finally deals (in sect 5) with *remedia juris*.

Achenwall (II, §§16–21) also draws a parallel between Natural Law in regard to 'societies' and Natural Law relating to individuals, distinguishing, in both cases, between three sorts of rights and duties—the absolute, the hypothetical, and those which arise from *laesio*.

136. *Syst nat* §373, *Jurispr. pos* §866 A similar argument appears in Achenwall (II, §24) and Hoffbauer, pp 192sqq

Nettelbladt's account of the deliberations and decisions of corporate bodies

137 *Syst nat* §§374–92 Nettelbladt discusses under this head (1) meetings, which may be either 'stated' or specially summoned, and either direct or representative, (2) *jura directorialia* (e g the summoning of meetings, the making of proposals, the collecting of votes and the formulating of resolutions), (3) votes and their different species (e g voting by heads and voting by *curiae*), (4) the right of voting, which belongs to all equally in any case of doubt, but lapses for the time being when a member abstains from voting or is absent in spite of having been duly summoned, and does not exist at all when the issue in question affects a member personally, (5) the order of voting, and the right to alter a vote given before a decision is finally taken, (6) the counting or weighing of votes, (7) the method of counting, (8) the formulation of decisions, (9) unanimity of votes, majority of votes, and equality of votes (in the last event, he remarks, *nihil conclusum est*, but the use of the lot eventually decides the issue), (10) the majority-principle (which is satisfied by a relative majority), and the exceptions to that principle, (11) *itio in partes* [or the taking of a division], and, more especially, the decision of the question whether an issue is really present which is suitable for settlement by that method, and (12) the cancelling of a decision He expressly remarks that all the rules suggested are equally valid for the decisions of a representative body or for those of a collegiate body of officials.

His account of the rules of positive law in these matters

138 *Jurispr pos.* §869 Nettelbladt also mentions the requirement that all should be summoned, and at least two-thirds should be present, the greater weight which is sometimes recognised as due to *saniorilas* [i e to the *senior*, as distinct from the *major*, *pars*], the *calculus Minervae*, §867 [what we should call the 'casting vote'], the continuance of the right to vote in spite of *non usus*, and the validity of a vote in one's own favour (a principle to be assumed in Germany on the analogy of canon law), §868 He also treats in detail of corporate seals (§870) and the proper proofs of *voluntas et consensus* (§871)

Other writers on the rules of voting

139 Cf Wolff (§§841–5), who even deduces from Natural Law the principle that where the contributions or benefits of the members are unequal, their voting power should be unequal, and proportionate to what they give or receive See also Daries, §763, along with §§750–62, Achenwall, II, §§26–8 (where, however, the reader is referred to *leges conventae* [i e positive law] for most of the particular questions raised), and Hoffbauer, pp 199–204 Christian von Schlozer (*De jure suffr* §§8–23) also seeks to derive the rules of corporate action from Natural Law, but he holds that Natural Law does not warrant either the principle of majority-decision, or the binding of those who are absent by the vote of those who are present He thinks that, if the idea of the *societas aequalis* is to be preserved, an agreement must be attained by means of *pacta adjecta* [i e positive rules super-added to Natural Law] before there can be any validity attached to the act of a majority, whether the majority be the ordinary form of majority (which in any case of doubt must be absolute, and not relative) or some specially qualified form The same is true in regard to casting votes, in regard to the obligation incurred by absent members (here there should also be further rules both about the competence of those present to take a decision and about the giving of votes by letter or by proxy), in regard to voting, for reasons of equity, by *curiae* or classes, and, finally, in regard to *jus eundi in partes* and *unio suffragiorum sibi*

mvicem adversantium [i e. the right of claiming a division, and the general methods of getting some sort of unity out of a number of conflicting views on an issue]

140. Cf. n 184 to §16, and the following notes.

The rights and limits of a majority

141. See Nettelbladt, §§388–9 (where it is argued that there can be no majority-vote *in causis jura singulorum concernentibus*), and §392 (where it is contended that decisions from which *jura quaesita* have subsequently arisen cannot be abrogated). Similarly Hoffbauer holds (p. 204) that a majority has no power to touch the rights which a member enjoys in the society (and therefore no power to touch the constitution), or even to touch any rights of a member derived from any other source C. von Schlozer contends that where pure natural law is followed—and where, accordingly, there is neither any majority-vote nor any obligation of the absent by the vote of those present—no question arises of [the majority modifying] the *jura singulorum* or the *leges fundamentales* (loc. cit. §13), and even where the validity of the majority-principle has been agreed upon by additional contracts [supplementary to the original contract constituting the society], the *pacta fundamentalia* and the *jura singulorum* are exempt from the operation of these contracts, and can only be altered by a *novum pactum* [in substitution for the original contract constituting the society].

142. *Syst nat* §§393–6, cf Wolff, §§197 and 1128–9 (where it is further suggested, in regard to the possessions of a community, that they belong to 'the descendants' also),* and Achenwall, II, §19

143 *Jurispr. pos.* §§872–7 (where he deals specially with the legal questions of *salarium*, the 'year of grace' [i e. a year's revenue granted to the family of an official at his death], family-property, and the *administratio bonorum*)

The by-laws of an association

144 *Syst nat* §398 The same line is taken by Wolff, §846 (see n 66 to this section), and by Achenwall The latter argues in II, §§29–30, that all the *leges* of the 'equal society' are *leges conventionales*, to which new members tacitly submit, but it is only *ut singuli* that the members are bound by these laws, and *ut universi* they are *supra leges*, and can alter them at pleasure In the same way he also argues (loc cit §34) that in the 'unequal society' the *imperans* promulgates laws by which he is not himself bound, and which he can alter at will But even in the 'unequal society' the *leges fundamentales* [as distinct from ordinary laws] are always to be regarded as *pacta* [and are therefore unalterable except by the consent of both parties to the pact], cf Nettelbladt, §399, and Achenwall, §35

145. *Jurispr.* §§884–91 (where he also treats of conflict of by-laws, their relation to common law, and their interpretation and application).

146 *Syst. nat* §§400–2. He pays particular attention to the contracts into which the *Superior* can legitimately enter *societatis nomine, limites suae potestatis non transgrediendo*, but he holds that in 'equal societies' which possess *potestas* it is only a decision of the society itself which can authorise such contracts

The obligations of associations

147 *Syst. nat.* §§404–5, where Nettelbladt argues that the 'obligations of individuals' are the duty of obedience and the duty of accepting office in the society, and that 'obligations of the society' [as distinct from those of individuals] arise from undertakings given by representatives, from *versio in rem ipsius societatis*,† from the acts of a *mandatarius legitimus* acting within the

* I e Wolff recognises not only (1) the present society and (2) the present *singula membra*, but also (3) 'the descendants', as having rights in the possessions of a community.

† See n 151 to §17 supra

limits of his powers, and from *actio societatis* A similar argument appears in his *Jurispr pos* §§893–4. In §898 he also deals with the non-admissibility [as regards societies] (*a*) of the principle of compensation as between *stationes fisci* [the different 'accounts' in the common fund?] and (*b*) of the principle of *restitutio in integrum* [the rescinding of an act by an official, in order to prevent the legal consequences which ordinarily attend such an act from taking effect].*

148 *Jurispr pos* §§895–7 He adds that a member is never responsible for another member, nor is a *successor in universitate*, unless he has an obligation as heir

149 Ibid. §877 He also remarks, in the preceding section, that a *universitas*, as a 'moral person', cannot administer its own property itself

150. Achenwall (II, §21) holds that a *societas*, as such, is capable of all obligations—both the 'absolute' and the 'hypothetical', and both the hypothetical arising from permissible and the hypothetical arising from non-permissible actions Scheidemantel only remarks (I, p 220) that 'penalties attached to whole communities should only affect the benefits which arise from the particular nexus of the given society'.

151 *Syst nat* §§406–7 He enumerates as *jura societatis* (in contradistinction to *jura singulorum*) the following (1) the admission of members, (2) the expulsion of members, (3) the disposition of the *res societatis*, (4) the making of provision for the *negotia societatis*, (5) the imposing of contributions for the attainment of the society's objects, including contributions from the *res et facta singulorum*, (6) *dispositio de ipsis juris societatibus* [*ipsis juribus societatis*?], even if such disposition be to the advantage or disadvantage of individual members and even if it takes the form of self-limitation or renunciation (e g that of renouncing a *jus prohibendi*) *Nettelbladt on jura societatis*

152 *Jurispr pos* §§899–903 Such peculiarities in the rights and duties of societies include privileges or charters, acquisition by *pollicitatio*, the loss [of property] after the lapse of 100 years, or by destruction, and limitations on the power of alienation

153 *Syst nat* §§408–9, and also §§293sqq.

154 *Jurispr pos* §§904 and 906 (which treat of interdicts [or, as we might say, 'injunctions'] and the peculiarities of fiscal law in regard to 'societies') *On possession by societies*

155 Loc cit §905 As regards *jura affirmativa*, possession of such rights is acquired [by other parties, as against a *universitas*] through toleration by the *universitas* itself, and not through toleration by individual members, while, conversely, the acquisition of possession by a *universitas* [as against other parties] can only be defeated by a stoppage of the proceedings of the *universitas ipsa* As regards *jura negativa*, possession of such rights is acquired [again by other parties, as against a *universitas*] through prohibition addressed to the *universitas* and the acquiescence of the *universitas ipsa*, while, conversely, the acquisition of possession by a *universitas* can only be defeated, once more, by a stoppage of the proceedings of the *tota universitas* and the acquiescence of all its members therein

156. *Syst nat* §§410–12 and *Jurispr pos* §§908–9 (reprisals, Nettelbladt argues, are not only permissible between States they are also permissible, in a peculiar way, between Churches, but other *universitates* have no more right in this respect than belongs to individual subjects). *On legal remedies of societies*

* The argument appears to be that ordinary societies do not enjoy the benefit of these principles, while the 'great society' of the State does

157. *Syst. nat.* §413. the jurisdiction of a society is no proper jurisdiction, such as that which universally appertains to States it is rather a *conventionalis potestas judicandi*

158. *Syst. nat* §414 (which deals with the processes of *actio*, *exceptio* and *provocatio*) In his *Jurispr pos* §§878–82, Nettelbladt deals more fully with the modes of legal action open to *universitates* He draws a distinction between cases in which the *causa universitatis qua talis* is 'divisible', and those in which it is 'indivisible' In cases of the first sort, the members (*singuli*) are in a position to make an effective disclaimer, though they are open to doubt as witnesses, but in cases of the second sort also they are not altogether free from suspicion as witnesses, and the distinction is thus really slight. . A *universitas* should take an oath by means of three or four of its members Nettelbladt also discusses the documentary evidence proper in such processes, and the proper proofs of descent in family-disputes

In §911 he deals with the prior rights of a *universitas* in cases of *concursus* [i.e of a conflict of claims]; and in §912 he treats of the conflict of claims arising when a *universitas* itself is involved in debt In the latter case he holds that, inasmuch as the substance of the property is inalienable, there can only be a *concursus anomalus*, with a sequestration and division among the claimants of the *income* arising from the property

159 *Jurispr pos* §846, cf also Achenwall, II, §8

160 Cf especially Wolff, §977, and Achenwall, *Proleg* §94 and II, §§41–84 (with nn 175 and 182 to §16 above) see also Cocceji, §281, Daries, §§606sqq , and Nettelbladt, *Syst nat* §§666sqq (where he classifies six sorts of family 'society'—*paterna*, *adoptiva*, *tutelaris*, *herilis*, *domus*, *conjugalis*), along with *Jurispr. pos* §851

On the other hand Hoffbauer, who treats marriage as an equal society which can be freely dissolved (pp 209sqq), considers that the relation of parents to children and servants is not a 'society' (pp 214sqq), and that the family is not a 'compound society' (p 221)

Nettelbladt treats aristocratic Houses as corporations

161 In his *Positive Jurisprudence* Nettelbladt reckons as *universitates* the German Empire, the Catholic and Evangelical Churches, local communities, *corpora et collegia*, and families (including *gens*, *familia* and *domus*), §§848–51 He treats the divisions of the family as *membra universitatis*, arguing that it is only special rules in regard to the acquisition or loss of members which distinguish such divisions from one another (§§860–62) He brings family-property (or *bona stemmatica*) which is *in dominio vel quasi dominio familiae* under the general head of *res universitatis* (§875), and he applies to its alienation (apart from a requirement that all the members of the family should give their consent) the general rules of Roman law in l 3 C. *de vend reb civ* (§903) He speaks of families as parties in civil suits (§882); and he refers to *statuta familiarum* [family by-laws or 'rules of the house'], which may be either *pacta*, or *dispositiones capitis familiae*, or *normae Superioris* (§886)

In his *Syst nat* he draws a distinction between (1) the rights of ruling families to the property of the 'House' or 'line', (2) the property-rights of the Fisc, and (3) the *patrimonium Principis* (§1349), and he also speaks of the *autonomia familiarum illustrium* (§1510).

162 See especially Nettelbladt, *Syst. nat.* §§358–9, on the application of the general rules relating to 'societies' to any *peculiare collegium repraesentativum* and to *deputationes collegii*, see also his *Positive Jurisprudence*, §850, on the division

of *corpora et collegia* into (1) *separata* and (2) those which are only *pars alterius universitatis*

Mere systems of co-ownership regarded as 'moral persons'

163. See, more especially, Wolff He distinguishes, in his theory of common property, between three forms of *communio* (1) the *communio negativa* of the state of nature, (2) *communio positiva*, with such and such shares for each participant, and (3) *communio mixta*, in which the property itself belongs to a *universitas*, and the individual has only a right of common user (*Instit* §§191–7). He interprets, however, the second of these forms—that of positive co-ownership—as being 'like ownership by a single person', and all that he assigns to the individual participant, other than the right of disposition in regard to his share, is a right of annulling the unity of ownership 'if the common right be not enjoyed conformably to the condition that it must remain common' (§196 and §§330–1) We may compare with this his remarks on collective credits and debts (§424), on common citizenship of towns (§573), on *societas negotiatoria* (§§639–48, and especially §642, 'on the share of each member in the property of the society'), on *communio incidens* or 'quasi-society' (§692), and, finally, on the 'mining contract' in regard to shares in mines (§683), which he surprisingly brings under the head of lottery-contracts (*Glucksvertrage*)

Nettelbladt not only assumes the existence of a single personality of many individuals when such individuals play the part of a 'moral person' *conjunctim* he also assumes its existence when they *disjunctim unam personam sustinent*, e.g. where it is a case of *correi* [i e persons severally responsible for the same debt], or of representatives and the persons they represent (*Jurispr pos* §§17–18). In his theory of *communio positiva* (*Syst nat* §§203–4), of *condominium* (§§222–5), and, more especially, of general and particular community of property (§§226–7), the [Teutonic] idea of 'the joint hand' makes its appearance—particularly in the fact that, while he ascribes the common property to all the members of a group taken as a whole, he also ascribes to each individual a quasi-private property in his share In this last connection it is to be noted that he confines *dominium* proper to *res corporales*, but he regards a *quasi-dominium* in *res incorporales* as co-existing with *dominium* proper (§215) [Hence the share of an individual, being an 'ideal' or incorporeal thing, can only be the object of quasi-private property, but this quasi-private property coexists with the *dominium* proper of the whole group]

164 It has already been remarked that the parallel between the division of one individual into several 'persons' and the union of several individuals in one 'person' helped to turn into an abstraction the idea of a person composed of a number of individuals, cf n 173 to § 16 supra

The group as merely so many individuals

165. Thus, for example, the whole of the theory regarding the authority of a community over its members is inapplicable to a society composed of two persons only, though such a society is none the less expressly recognised as a 'moral person', and the consequence is that the greater part of the general theory of societies is inapplicable in such a case Cf Achenwall, II, §8 (who remarks that, provided there are more than two members, the sum of the reciprocal rights and duties thus involved gives rise to a *jus sociale universorum in singulos singulique cujuslibet in universos*) cf also Heineccius, II, §14, and Nettelbladt, *Syst nat* §§84 and 333 Similarly we find thinkers compelled [by this general point of view which led them to make concessions to the rights of individuals] to accept as causes of the dissolution of a *societas*

the fact of the death of its members, or the disappearance of a member, or resignation, etc · Nettelbladt, §333.

Yet it exists apart from individuals

166. We may notice especially, for the light which it throws on this tendency, the way in which Nettelbladt (loc cit §86) seeks to justify his assumption that the 'moral personality' of a *societas* can persist in a single member, or even without any member, if there be ground for expecting its reconstruction *essentia enim personae moralis consistit in individuorum consociatione, et si adhuc superest unum individuum, id repraesentat reliqua; si vero nullum actu adest, quae in spe sunt individua pluralitatem individuorum constituunt* We may also note the interpretation of community-property in Wolff, cf n 142 to this section.

167. Cf nn 114 and 130 to this section, and also nn 176 and 181 to §16

168 Cf supra, pp. 179–180

169. Cf especially the views of A L and C. von Schlözer, and of Hoffbauer, as stated in nn 186–92 to §16

170. Humboldt's *Ideen*, pp. 121, 123sqq, 125, 129 'The less a man is enabled to act otherwise than as his will desires or his force allows him, the more favourable is his position in the State'

171 Ibid pp 129–32

Denial of any international society

172. Cf Pufendorf, *Elem* §§24–6 and *J. n et g* II, c 3, §23, Gundling, c 1, §54; Hertius, II, 3, pp 21sqq., Huber, I, 1, c 5, J H Boehmer, *Jus pub univ*, *P gen* c 2, §§3–7, *P. spec* I, c 3, §22 n. *l* Justi also argues (§§222–3) that international law does not depend on the existence of a social union of States or a joint federal State It is rather that a state of nature exists between different nations, and that they live in that state, like individuals, by their own will, without any association, in perfect liberty and equality But they live on the same globe, they are therefore subject to the fundamental rule that they must do as they would be done by, and there thus exist among them duties of good-fellowship—though there is no society. Cf also Spinoza, *Tract pol* c 3, §§11–18, and Horn, *De civ.* c 2, §§4–9.

Admission of such a society

173 Mevius, *Prodromus*, §§5–9 and 18–20 the *societas communis inter omnes populos* is the source of international law, and the authority of that law depends, not on any agreement, but on the rational order which holds good for this *socialis populorum conjunctio* Cf also Johannes a Felde, I, c 1, p 5, Praschius, §3, Placcius, Bk III, Leibniz, Introduction to *Cod Gent dipl* I, §13, *Fragment on Natural Law*, p 420, and *Caesar-Furst* cc 31–2, Bossuet, I, art 5

Thomasius on the societas gentium

174 Thomasius, *Instit jur div* I, c. 2, §§101–4, III, c 1, §§38–56 He censures the Aristotelians for neglecting the *societas gentium* he proves its existence (*quia universum genus humanum natura est unitum ad certum finem*), and he describes it as a *societas maxime naturalis*, which produces a *juris communio*. But international law proper is in his view only a part of the *lex divina naturalis* discoverable by human reason, it is not a *jus humanum*, or system of positive law. For (1) there is no *Superior*, (2) contracts only oblige men *lege intercedente*, just as custom only binds them by virtue of a *tacita approbatio principis*, and (3) the assumption of an express or tacit *pactum universale* is a mere fiction

The views of Wolff and his successors

175. Wolff, *Instit.* §§1090–2, Daries, §544 (where the *societas universalis omnium hominum* is treated as a *societas necessaria*), Nettelbladt, *Syst nat.* §§1420sqq. (there is a *societas natura constituta* 'for the preservation of the human race'), Achenwall, *Proleg* §§82–90, I, §§43–4, II, §§210–88 (on the *societas universalis*). In all these writers there is a general recognition that

there is also such a thing as positive international law Wolff, for example, speaks of a *jus gentium voluntarium, pactitium,* and, to some extent, *consuetudinarium*, and Nettelbladt admits *leges* [*gentium*] *sociales seu systematicae* as well as *leges gentium stricte naturales*

176. Thomasius argues that the *societas gentium* is not a *respublica universalis*, but a *societas aequalis* with no *imperium*, and that, far from perfecting the State, it is *imperfectior civitate* (*Instit jur div* III, c 1, §§52–3, *Fund* III, c 6, §5) The same line of thought appears in J a Felde, I, c. 1, p 5, and Nettelbladt also remarks (§1420) that the society of peoples is a *systema gentium* rather than a *civitas maxima*

177 Wolff, §1090 Achenwall also uses this term (*Proleg.* §§82sqq), cf Vico (p 156), *omnes orbis terrarum respublicae una civitas magna cujus Deus hominesque habent communionem*

Kant and Fichte on a league of nations

Kant finds the ideal goal of human progress in a World-State (*Volkerstaat* or 'World-Republic') with a definite cosmopolitan constitution and a single Head, but he holds that the only goal which can be attained under present conditions is the institution of a 'League' ('Federation' or 'Fellowship') for the prevention of war (*Works*, VI, pp 340–6, 415–20, VII, pp 162 and 168sqq).

Fichte, who differs from all other writers on Natural Law in deriving international law not from the relations of States to one another, but from those of the individual citizens of different States, desires a voluntary 'League', which is not to be a *Völkerstaat*, but is to possess judicial and executive authority for producing a state of peace (*Naturrecht*, II, pp 261sqq , *Works*, III, pp 379sqq , *Posthumous Works*, II, pp 644sqq)

178 Pufendorf, *De systematibus civitatum*, §8, *J n et g* VII, c 5, §16, *De off hom et civ* II, c 8, §13, Horn, *De civ.* II, c 2, §14, Becmann, *Med* c 22, Huber, *De civ.* I, 2, c 2, §§20 and 28, I, 3, c 3, Thomasius, *Instit jur div* III, c. 6, §§57–8, Schmier, I, c. 4, no 67, Hertius, *Elem* I, s 12, §§7–8 and II, s. 18, Gundling, c 37 (36), §§37–47, Titius, *Spec. jur publ* VII, c. 7, §37, J H Boehmer, *P spec.* I, c 3, §§27–9, Daries, §§808–11, Achenwall, II, §§189–90, Heincke, I, c 3, §§27–31, A L von Schlozer, p 117, §6.

179 Pufendorf, *J n et g* VIII, c 9, *De off hom et civ* II, c 17, Huber, III, 4, c 3, Gundling, c 12 (11), §§34–42 and also c 24 (23), §§16–19 on 'Mascopeyen' [or 'contracts of society'] among nations, and on *societates bellicae* and common governments, Daries, §§802–5, Achenwall, II, §§240–2

Thomasius on federatio

Thomasius (*Instit jur div* III, c 1, §§35–7 and c 8, §§1–27) adopts a peculiar line of argument He regards any federal association between a number of States, when it represents only a *social* form of *unio voluntatum* and is constituted for a limited period, as being a *societas perfectior civitate*, on the ground that it supplements in certain directions the power of a single State which is inadequate by itself Such an association, he thinks, is indeed an 'arbitrary' community, but it marks an approach to *societas naturalis* He draws, however, a sharp distinction between a *societas inter plures respublicas confoederatas* and a *systema civitatum* the former he regards as constituted only for a definite object (*certae utilitatis gratia*), but the latter as a *perpetua unio . indefinitae gratiae causa.*

180 Pufendorf, *De syst* §§9–15 and *J. n et g* VII, c. 5, §17, Huber, I, 2, c. 2, §§24–7, Daries, §§806–7.

181. Hert, for example, writing in 1689 (*Elem* I, 12, §5 and II, 17, §§1–5), already notes that unions under a single king are possible not only where

The theory of a 'real union' of States

there is no other bond of connection, but also when there is a considerable amount of community between the countries so united Titius, writing in 1703, in his commentary on Pufendorf's *De off hom et civ.* II, c. 5, § 14, draws a sharp distinction between a mere personal union, *sub uno capite*, and a real union, in which there is also a common exercise *nonnullarum imperii partium*, and he holds that a *systema* exists in the latter case only, and not in the former Treuer takes the same line, in his commentary on the same passage; cf also Schmier, I, c. 4, nos. 68–76 The same view also appears in Heineccius (1737), *Elem.* II, § 119 (but he was not, as Juraschek assumes (p 13), the first to take this view) See also Nettelbladt, § 1172, who adds the idea of [the union of] a predominant State with subsidiary States Apart from these writers, we generally find the idea of *unio per incorporationem* expounded.

The theory of the corpus confoederatorum

182. Pufendorf, *De syst* §§ 16sqq., *J n. et g* VII, c. 5, §§ 18sqq , *De off. hom. et civ* II, c. 8, §§ 13sqq there is *unum corpus*, but no *civitas*, for *singulae civitates summum in sese imperium retinent*, and they have only bound themselves contractually *circa exercendum communi consensu unam aut alteram partem summi imperii* we cannot, therefore, ascribe to this category [of *corpora confoederatorum*] a State composed *ex pluribus corporibus subordinatis*, or, again, a State which leaves some degree of independence to conquered provinces. Cf Huber, I, 2, c 2, §§ 20–3 the federal assembly *non est omnium caput, sed plura capita repraesentat. non vere imperat, sed imperata singulorum communiter exequitur*, the sovereignty of the members of the federation remains intact (I, 3, c. 3). See also Thomasius, *Instit jur div* III, c. 6, §§ 57–8, where, however, the term *compositae respublicae* is used, Hertius, *Elem.* I, s. 12, §§ 7–8 and II, s 18, and Gundling, c 37 (36), §§ 37sqq. Schmier remarks that it is only an appearance of *una respublica* that is ever present: *revera sunt et manent inter se distinctae et diversae, utpote voluntates res bonaque sua seorsim et separatim habentes* (I, c. 4, nos 77–88) Titius (*Diss* § 76 and *Jus publ.* VII, c 7, §§ 34–5) speaks of *corpus civile ex pluribus civitatibus ita compositum, ut unaquaeque civitas summum ac plenumque etiam plenum imperium habeat, sed ita limitatum, ut quaedam ejus partes conjunctim ab omnibus sint exercendae.* See also J H. Boehmer, *P spec* I, c. 3, §§ 27–9, Daries, §§ 808–11, Achenwall, II, § 190, Heincke, I, c 3, §§ 27–31 (a *systema civitatum*, he holds, is a *corpus morale* which wears the appearance of a single State owing to the common exercise of the rights of sovereignty, it is a *societas juris naturalis*), Kreittmayr, § 4, A L von Schlozer, pp 117–18 (what is in question, he thinks, is a 'civil society' or 'community' of States, but not a State).

Such a body cannot act by majority-decision

183 Pufendorf, *De syst* §§ 17–21 and *J n. et g* VII, c 5, §§ 19–21 it is necessary that there should be some meetings, and it is possible that there should be a permanent federal council, but the deputies attending the former continue to be *ministri sociorum*, while the latter (the *concilium deputatorum*) has only a 'delegated power', and its *vis et auctoritas provenit a socio* the majority-principle is inapplicable, since it means the presence of an *imperium*, and here every member has the right of secession Horn takes a similar view, holding that everything has to be done *ratione pacti et sociorum liberrimo consensu* (II, c. 2, § 14), and A. L von Schlozer also considers that the use of a majority-vote is not possible in a federal Diet, and that, for this very reason, such a political system has no final judge and is devoid of responsibility (pp 118–19).

Views to the contrary

184 Huber allows a certain amount of validity to majority-decisions (I, 3, c. 3): the same view is taken by Hert, in his notes to Pufendorf's *J n. et g.*

VII, c 5, §20, and by Schmier, loc cit. no. 88 J. H Boehmer (I, c 2, §4), Achenwall (II, §190), and Kreittmayr (§4) regard the rules of *societates aequales* as applicable to federations. Danes takes the same view (§§808–11); but he considers that a *directorium*, with a *jurisdictio conventionalis* between the members of the federation, is also possible.

Irregular or monstrous forms of federation

185. Pufendorf, *De rep irreg., J n. et g* VII, c 5, §§12–15 and 20, *De off. hom. et civ.* II, c. 8, §12 he regards any federal body in which the validity of the majority-principle is agreed upon as being a *corpus irregulare* Gundling (loc cit) clings to the view that any such political system should be termed a *monstrum*. J H Boehmer (I, c. 3, §29), while he introduces the idea of the two possible origins of a federal system (it may be due to the negative fact of disintegration or devolution, as well as to the positive fact of *foedus* or integration), describes the 'irregular system' as pitiable

The problem of the Holy Roman Empire

186 Cf Otto's commentary on Pufendorf's *De off hom et civ* II, c 8, §12 Hertius, I, s. 12, §§6–9 and II, s. 19, where formations intermediate between a federation and a State with provinces, such as the German Empire, are merely treated as being *respublicae irregulares*, in just the same way as ordinary unions and federations, Schmier, I, c 4, s 3, §§1–3, and Titius, VII, c 7, §§36–54 Titius, we may also note, applies to federal forms of the State the general distinction which he draws between States which are *adstrictae* and those which are *laxae* (cf n. 167 to §17 above, and p 155), and he accordingly includes the 'systems' (or *civitates compositae*) which have been constituted by a *foedus adstrictum* under the head of *adstrictae*, and those which are due to the disintegration of a unitary State under that of *laxae* See also Huber (I, 3, c 3, §§17–20), who admits that there are deviations from the general norm in the German Empire, and see also Kreittmayr (§4), who tries to meet the difficulty by suggesting that side by side with the *systema civitatum foederatarum aequale*, such as is to be found in Switzerland and Holland, there may also exist an unequal system of federated States, like the political structure of Germany. A L von Schlozer also holds (p 118) that 'scattered in a number of fragments, the 300 members of the giant body of Germany' only constitute a mere society [and not a State].

Leibniz on federalism

187 *Caesarinus-Furstenerius*, c 11, and *Demonstr pol prop* 57. Leibniz, it *is true, does not base himself upon Natural Law in defending the cause of* federalism. On the one hand, comparing the difference between a *confoederatio* and a *unio* with that between a *societas* and a *collegium* or *corpus*, he will only admit the emergence of a new *persona civilis* when there is a corporate group [and therefore he will not admit that there is such a *persona* in a *confoederatio*, which is only a *societas*, and not a corporate group], on the other hand, he abandons the idea of sovereignty, holding that a real political authority of the Group-person, exercised over the member-persons, is compatible with the *libertas et suprematus* of these member-persons [It follows that Leibniz (1) from the first point of view, cannot apply the natural-law idea of the 'moral' or 'civil' personality of Groups to federations, and (2) from the second point of view, cannot apply the natural-law idea of the sovereignty of the State to federations, or indeed to any other form of State, since he has abandoned that idea *in toto*, cf supra, n 48 to §17, and cf also n 253 to §16 In dealing with federations, Leibniz is thus outside the ground of Natural Law, because he is unable to use either its idea of Group-personality or its idea of State-sovereignty.]

188. *Esprit des Lois*, IX, cc 1–3 In treating of the *république fédérative*,

Montesquieu on federations

which he sometimes describes as *état plus grand* and sometimes as a *société des sociétés*, Montesquieu makes no definite distinction between the different forms which it may assume (cf Brie, *Der Bundesstaat*, I, p. 31), but at any rate he leaves room, under this heading, for a real federal State. He regards the German Empire (which he describes in another passage—Bk x, c. 6—as a *république fédérative mixte*, with a Head who is *en quelque façon le Magistrat de l'union et en quelque façon le Monarque*) as being a more imperfect form than the federations in Switzerland and Holland, on the ground that monarchy is not so suitable for a federal constitution

189. *Syst. nat* §§ 1160, 1172–7, 1183, 1221–5, 1406–9. Hoffbauer is in agreement with him, pp. 314–15.

Nettelbladt on the respublica composita

190. *Syst. nat.* §§ 1160, 1172, 1174, 1408 A *respublica composita* is present when *diversae respublicae unam rempublicam, cujus potestati civili subjectae sunt, constituunt*, but the member-States are not sovereign, and therefore they are not, in external relations (though they are *in relatione ad Rempublicam majorem*), independent *gentes* (i e 'persons' in international law).

191. A composite State may be a monarchy or a republic: so may also its *respublicae minores* (§ 1175). In such a State there is a *duplex potestas civilis*—the *summa* and the *subordinata*, and the latter of these powers may, in turn, be exercised doubly—both by the member-States to the exclusion of the *summa potestas* [i.e. the federal authority] and by the member-States concurrently therewith (§ 1176) Similarly there is a *duplex subjectio* (§ 1177). Such a State may come into existence either by integration of States or by way of disintegration (§ 1183). Again, in such a State, we have a new distinction between different kinds of members added to the other distinctions which we generally find in States—the distinction between *membra immediata* and *membra mediata* (§§ 1122–3). If we regard the *membra rerumpublicarum minorum*, we find that the Heads of these lesser or contained States are *superiores* on what we may call a 'downward' view, but *subdita* on an 'upward' view, while the other members of such States [i e. the members other than the Head] are *in duplici subjectione*, with the lower *superior* taking precedence in case of conflict; §§ 1224–5. [Gierke adds that he intended to treat the theory of the federal State, as it appears in the literature of positive German public law, in a subsequent section; but this section was never published]

192. A later section (§ 20) was to have been devoted to this theme, but the section has not been written

LIST OF AUTHORS CITED

A 1500 to 1650
B 1650 to 1800

A. LIST OF AUTHORS CITED. 1500–1650

ALBERGATI, F., a native of Bologna, who published at Bologna, in 1599, a work entitled *Il Cardinale*, and at Rome, in 1583, a *Trattato del modo di ridurre a pace l' inimicitie private* Gierke refers to his *Discorsi politici* as an attack upon Bodin which is based on Aristotle (Rome, 1602)

ALSTED, J. H. A., 1588–1638, professor of philosophy at Herborn (in Nassau), and teacher both of philosophy and theology; an encyclopaedic writer on both of these and on a number of other subjects Gierke refers to his *De Statu Rerumpublicarum*, Herborn, 1612.

ALTHUSIUS, J., 1557–1638, professor of law at Herborn, 1590, and syndic of the town of Emden, 1601 Gierke first drew the attention of scholars to his writings by the monograph which he devoted to them in 1880 The two of his writings which he repeatedly quotes in this section are *Politica methodice digesta*, 1st edition, Herborn, 1603, 3rd, 1614 (the 3rd edition has lately been reprinted, with some few omissions, and edited with an introduction, by C J Friedrich, Harvard University Press, 1932), *Dicaeologia*, Herborn, 1617, a work in two books, *totum et universum jus quo utimur complectentes.*

ARNISAEUS, H., a student and teacher of medicine, philosophy and politics, who, after first professing ethics at Frankfort on the Oder, and then medicine at Helmstedt, became physician to the King of Denmark, and died at Copenhagen in 1636 In his political doctrines he was an opponent of Althusius He published two volumes of 'collected political writings' (Leipzig, 1633 later edition, Strassburg, 1648) Gierke refers to five of his political writings· *Doctrina politica in genuinam methodum quae est Aristotelis reducta*, first published in 1606, and suggesting by its very title an attack on Althusius' *Politica methodice digesta* of 1603, *De jure majestatis libri tres*, first published in 1610, *De auctoritate principum in populum semper inviolabili*, first published in 1611, *De Republica, seu reflectionis politicae libri duo*, first published in 1615, *De subjectione et executione clericorum*, published in 1612 J. Maxwell, sometime bishop of Ross, published *Lex, Rex the Law and the Prince*, in 1644, 'with a confutation of the ruinous grounds of H Arnisaeus' (and of William Barclay, *q v*)

ARUMAEUS, D., 1579–1673, a jurist, professor of law at Jena, and said to be founder of the study of public law in Germany He published in 1617–23 five volumes of *Discursus academici de jure publico*, written by himself and by other scholars.* Gierke refers to various contributions which appear in this collection.

AYALA, B., born at Antwerp about 1548, a jurisconsult, who held at one time a financial post in the army of Philip II of Spain, and wrote a work *De jure et officiis bellicis et disciplina militari*, published at Douai, 1582, and republished at Antwerp in 1597

BARCLAY, W., 1543–1605, a Scotsman from Aberdeen, who studied law at Bourges under Cujas, and himself became professor of civil law at Angers In addition to commentaries on Roman law, he wrote· *De Regno et regali*

* Such *discursus* are often disputations held before—or, as we should nowadays say, theses supervised by—the professor who edits the collection

potestate, adversus Buchananum, Brutum [i.e the author of the *Vind. contra Tyrannos*], *Boucherium et reliquos Monarchomachos*, Paris, 1600 (Gierke cites the Hanover edition of 1612) Locke refers to this work at the end of the *Second Treatise* Barclay also wrote a work on the Papacy, which was published posthumously, in 1609, under the title of *De Potestate papae, an quatenus in principes saeculares jus et imperium habeat*, representing the Gallican point of view.

BEKINSAV (Becconsall), W , 1496–1559, fellow of New College, Oxford, and author of *De supremo et absoluto Regis imperio*, a work dedicated to Henry VIII, and published in 1546 (Gierke cites the reprint in Goldast's *Monarchia Sacri Romani Imperii* of 1611).

BELLARMINE, R , 1542–1621, cardinal-archbishop of Capua, member of the Jesuit order, and one of the chief writers of the Counter-Reformation. Gierke refers to his *De potestate summi pontificis in rebus temporalibus adversus Barclaium* (first published in 1610, but cited according to the Cologne edition of 1611) This work, as being Ultramontane, and as attacking the more Gallican attitude of Barclay's work on the Papacy, was at once condemned by the Parlement of Paris in the year of its publication Gierke also refers to other writings of Bellarmine, more particularly his *De Laicis*, in the Cologne edition of his *Opera omnia*, 1620

BENECKENDORF . Author of *Repetitio et explicatio de regulis juris*, Frankfort on the Oder, 1593.

BERCKRINGER, D , sometime tutor to the children of the Elector Palatine; became professor at Utrecht in 1640, and died in 1667 Gierke refers to his *Institutiones politicae sive de Republica*, published at Utrecht in 1662. He is also said to have written, in answer to Hobbes, an *Examen elementorum philosophicorum de bono cive*, which was never published

BESOLD, C. B , 1577–1638, a jurist, who became professor of law at Tubingen in 1610, but crossing over to the Catholic side during the Thirty Years' War (in 1630), he became professor of civil and public law at Ingolstadt, in Bavaria, in 1635 He was a voluminous writer, both on legal and (after his conversion) on ecclesiastical subjects Gierke refers to his *Opus politicum* (or, as it was called in an earlier form, which first appeared in 1618, *Politicorum libri duo*), and cites it according to the Strassburg edition of 1626 It is a collection of 'Discourses', which are sometimes cited separately by Gierke (e g *Discursus III de Democratia*, and the 'Discourses' *De statu Reipublicae mixtae* and *De jure Universitatum*)

BEZA, T , 1519–1605, the great Calvinist teacher in the age succeeding Calvin himself To him we may ascribe, for reasons given by A. Elkan, *Die Publizisten der Bartholomausnacht*, the authorship of the anonymously printed *De jure magistratuum in subditos et officio subditorum erga magistratus*, which professes to have been printed at Magdeburg in 1578 The work deals with the problem of resistance, as it had been raised in the minds of the French Calvinists after the massacre of 1572, and seeks to re-define the Calvinistic attitude to that problem. There is a French version (of 1574), entitled *Du droit des Magistrats*, which was printed before the Latin original.

BIERMANN Author of *Dissertatio de jure Principatus*

BLONDEL, D , 1591–1655, Huguenot preacher and writer. successor to Vossius in the chair of history at Amsterdam in 1650 *De jure plebis in regimine ecclesiastico*, Paris, 1648

BODIN, J., 1530–96, French jurist and man of affairs. *Six livres de la République*,

1577. In Latin, under the title of *De Republica*, 1584 Cited by Gierke in the second Latin edition, Frankfort, dated 1591. A full account of Bodin is given in J W Allen's *Political Thought in the Sixteenth Century*.

BOLOGNETUS, 1539–85, ecclesiastical writer on jurisprudence. *De lege, jure et aequitate*.

BORNITIUS, J , a German jurist of the first half of the seventeenth century Four works, including one on sovereignty (*De majestate politica*, Leipzig, 1610), are cited by Gierke in note 16 to § 14. The dates range from 1607 to 1625.

BORTIUS, M. *De natura jurium majestatis et regalium*, printed in Arumaeus (*q v*), I, no. 2 (1616)

BOUCHER, J , 1550?–1644, Catholic teacher at Reims and afterwards at Paris, where he was a champion of the League, afterwards canon of Tournai He wrote *De justa Henrici III abdicatione e Francorum regno*, Paris, 1589 Barclay (*q v*) attacks him as a Catholic *monarchomachus*, along with the Protestants Buchanan and Languet.

BOXHORN, M Z , 1602 (or 1612)–53, professor in the University of Leyden; classical scholar, historian and writer on politics Gierke cites *Institutionum politicorum libri duo*, 2nd edition, Leipzig, 1665.

BRUTUS, STEPHANUS JUNIUS, probably the pseudonym of Hubert Languet, 1518–81, see *Cambridge Historical Journal*, 1931. *Vindiciae contra Tyrannos*, Edinburgh (really Basle), 1579 (Walker's translation, of the seventeenth century, has been reprinted with an introduction by H J Laski)

BUCHANAN, G , 1506–82, classical scholar, historian and tutor of James VI of Scotland *De jure regni apud Scotos*, 1579 (cited in the 2nd edition of 1580).

BUSIUS, P., ?–1617, professor of law in the University of Franeker, in the United Provinces *De Republica libri III*, Franeker, 1613 The British Museum Catalogue also mentions a *Tractatus de vi et potestate legum humanarum in tres partes dissectus*, Douai, 1608

CARNIN, CLAUDIUS DE *Malleus tripartitus*, Antwerp, 1620

CARPZOV, B C , 1595–1666, jurist. *Commentarius in Legem Regiam Germanorum, sive capitulationem Imperatoriam*, 1623 *Jurisprudentia ecclesiastica seu consistoralis*, 1649 The first of these works, dealing with the conditions to which the Emperor agreed at his election, is a treatise on the public law of Germany at the time· the second deals with Protestant Church law in Germany

CASMANNUS, O , ?–1607, theologian and philosopher, who taught at Stade (in Hanover) He published a work on *Psychologia anthropologica* in 1594. Gierke refers to his *Doctrinae et vitae politicae methodicum et breve systema*, Frankfort, 1603

CLAPMARUS, A C , 1574–1604, publicist. *De arcanis rerumpublicarum libri VI*, first published posthumously, 1605

COLLIBUS, HIPPOLYTUS A, 1561–1612, a jurist, of Italian origin, born in Zurich, who served the Elector Palatine from 1593 onwards He wrote works on the *Nobilis* (1588), the *Princeps* (1593), the *Palatinus sive Aulicus* (1600) and the *Consiliarius* (1596). The third of these appeared in the *Speculum aulicarum atque politicarum observationum* printed at Strassburg in 1600, along with a reprint of the fourth.

CONNANUS (Connan, F de), 1508–51, a French jurist. *Commentarii juris civilis*, Paris, 1538 (cited in the Basle edition of 1557)

CONRING, H , 1606–81, professor at Helmstedt, first of medicine and afterwards also of law· one of the great polymaths of his day, who wrote on

theology as well as on medicine, law and politics. Gierke refers to the *Dissertationes* (e g *de Republica* and *de necessariis partibus civitatis*) in vol III of his *Opera*, as published at Brunswick in 1730.

CONTZEN, A., 1573–1635, Jesuit confessor and controversialist. *Politicorum libri X*, Mainz, 1621.

CORASIUS, J. (Jean de Coras), 1513–72, French teacher of law at Toulouse, a Huguenot, who perished in the massacre of St Bartholomew Gierke refers to his *Commentarii* on some titles of the Digest, and his *Enarrationes* on certain *responsa*, published at Lyons, 1560

COTHMANN, E , 1557–1624, jurist and professor of law at Rostock Gierke refers to his Commentary on Justinian's *Institutes* and *Code*, 1614, 1616.

COVARRUVIAS Y LEYVA, DIEGO (Didacus), 1512–77, professor of canon law at Oviedo, and bishop of Ciudad Rodrigo and Segovia, president of the Council of Castille, one of the chief jurists of his time. Gierke refers to his *Practicae Quaestiones* (in the *Opera omnia*, printed at Frankfort, 1583).

CRÜGER, J , *Collegium Politicum*, Giessen, 1609

CUJACIUS (Cujas), J , 1520–90, professor at Bourges, the greatest jurist of his time Gierke refers to his *Paratitla* to the *Digest* and the *Code*, and his notes on the *Institutes*

DANAEUS (Daneau), L , 1530–96, French Calvinist minister. *Politices Christianae libri VII*, 1596 (cited in the Paris edition of 1606)

DOMINIS, M A. DE, 1566–1624, a Dalmatian, who, after being professor at Padua and Brescia, became Archbishop of Spalatro. He wrote a work *De Republica Ecclesiastica*, and being anxious to publish it, he took counsel with Sir Henry Wotton at Venice, and proceeded to England, where he received preferment, and published in 1617 the first part of his work. Another part was printed in England in 1620, and a third part in Germany in the same year The whole work includes ten books and fills three folio volumes

ERENBERGK, W DE, Eberhard von Weyhe, a German jurist and statesman, 1553–1633 *circiter*, who used the Latin pseudonym Waremundus de Erenbergk in some of his writings His *Aulicus politicus* (Hanover, 1596), to which Gierke refers in note 6 to § 14, was printed under the pseudonym of Durus de Pascolo. (It is included in the *Speculum*, etc , mentioned above under Collibus, H a.) He used the other pseudonym, however, for a treatise *de regni subsidiis* (Frankfort, 1606), which Gierke also quotes.

FELDE, J A, see Bibliography B.

FELWINGER, see Bibliography B

FRANTZKE, G , *1594–1659*, German jurist and administrator. He wrote Commentaries on the *Institutes* (Strassburg, 1658), as well as on the *Digest* (Strassburg, 1644)

FRANTZKEN . Gierke cites under this name a disquisition *de statu reipublicae mixtae* (or *mixto*), printed in Arumaeus (*q v.*), and another *de potestate principis*. (Should they properly be cited under the name of Frantzke?)

FRIDENREICH, Z. *Politicorum liber*, Strassburg, 1609

GENTILIS, A., 1551–1611, professor of civil law at Oxford, 1587–1611 Gierke refers to his *De jure belli* (1588–9), which preceded by many years the work of Grotius.

GNEINZIUS, C., *Exercitationes politicae*, Wittenberg, 1617–18

GRASZWINKEL, DIRK, 1600–66, a Dutch jurist, who worked with Grotius and was associated with John de Witt. He wrote on behalf of the Venetian State, as

well as against Selden's *Mare clausum*. Gierke refers to his *De jure majestatis*, the Hague, 1642.

GREGORIUS, P, 1540?–96?, teacher of law first at Toulouse (hence called Tholosanus) and afterwards at Pont-à-Mousson *De Republica libri XXVI*, 1586, cited in the Frankfort (? Lyons) edition of 1609

GREGORIUS DE VALENTIA—see Valentia

GROTIUS, HUGO, 1585–1645. *De jure belli et pacis*, Paris, 1625, cited in the Amsterdam edition of 1702 *De imperio summarum potestatum circa sacra*, Paris, 1646, cited in the 4th edition, the Hague, 1661

GRYPHIANDER *De Civili Societate* (in Arumaeus, *q v.*)

HEIDER, W, 1558–1626, professor of ethics and politics at Jena, and a follower of Aristotle. *Systema philosophiae politicae*, 1610 (cited in the Jena edition of 1628)

HEMMING, N, 1513–1600, professor at Copenhagen, a follower of Melanchthon. *De lege naturae apodictica methodus*, 1577, cited in the Wittenberg edition of 1652

HOBBES, T, 1588–1679, *Elementa philosophiae de Cive*, originally published at Paris in 1642 with the title *de Cive* published under the fuller title in the Amsterdam edition of 1647, which Gierke has used *Leviathan*, 1651, a Latin version was made by Hobbes for the Amsterdam edition of his works in 1668, and Gierke has used this version

HOENONIUS, P H, 1576–1640, teacher of law at Herborn, in the service of various German princes. *Disputationum politicarum liber*, 3rd edition, Herborn, 1615 (a work of the nature of a system of public law)

HOTOMAN, F, 1524–90, French jurisconsult and Huguenot lived, after the massacre of St Bartholomew, in Geneva and Basle. *Francogallia*, Geneva, 1573, cited in the Frankfort edition of 1665 (Translated into English in 1711 by Viscount Molesworth, with a famous preface on the nature of Whig principles) Gierke also refers to his *Quaestiones illustres*

KECKERMANN, B, 1571–1609, professor at Heidelberg, and a follower of Aristotle *Systema disciplinae politicae*, Hanover, 1607

KIRCHNER, H, published a number of works at Marburg, including one entitled *Legatus* (the rights, dignity and office of the Ambassador, 1614) Gierke cites his *Respublica*, Marburg, 1608 Coryat's *Crudities* includes his oration 'in praise of the travell of Germany in particular'

KLING, MELCHIOR, 1504–71, jurist and lecturer at Wittenberg *Enarrationes in libros IV Institutionum*, 1542

KNICHEN, A, see Bibliography B

KNIPSCHILDT, P, 1596–1657, publicist and syndic at Esslingen, an imperial Free Town *Tractatus politico-juridicus de juribus et privilegiis civitatum imperialium*, Ulm, 1657

KONIG . *Acies disputationum politicarum*, Jena, 1619 *Theatrum politicum* (n d).

LAMPADIUS, J, 1593–1649, jurist and minister in the duchy of Brunswick. *De jurisdictione imperii Romano-Germanici 1620 circiter* Conring (*q.v.*), and later Kulpis (see Bibliography B), were concerned in the later editions of the work, published under the title of *De republica Romano-Germanica.*

LAPIDE, HIPPOLYTUS A (the pseudonym of B. Chemnitz), writer and publicist, 1605–78, *De ratione status in imperio nostro Romano-Germanico*, 1640. (*Ratio status* here is not *raison d'état*, but 'general principles of government'.)

LAUTERBACH, W. A, 1618–78, jurist and professor at Tübingen. *Dissertationes*

academicae, 1694. *Compendium juris*, 1679. Both of these works appeared posthumously

LESSIUS, L., 1554–1623, Jesuit, professor of philosophy at Douai, and afterwards of theology at Louvain *De justitia et jure*, 1606 (cited in the edition published at Antwerp in 1612).

LIEBENTHAL, C., 1586–1647, professor of 'practical philosophy and rhetoric' at Giessen *Collegium politicum*, 1619, cited in the Marburg edition of 1644.

LIMNAEUS, J. L., 1592–1665, jurist, chancellor in the duchy of Brunswick Gierke refers to *Jus publicum Imperii Rom.-Germ.* 1629–45 He also wrote a commentary on the *Wahlkapitulationen* (*Capitulationes imperatorum*), from Charles V onwards, published in 1651 at Strassburg

LIPSIUS, J., 1547–1606, professor at Leyden (with Scaliger), and afterwards at Louvain *Politicorum libri VI*, Antwerp, 1589 (cited in the edition of 1604) (Lipsius advocated a system of one exclusive religion, and his policy for dissidents was *ure et seca*)

LUGO, J. DE, 1583–1660, Spanish Jesuit, professor of theology in Rome, made cardinal in 1643 (Quinine, first distributed in his palace by the Jesuits, who had received it from South America, was called *poudre de Lugo*) *De justitia et jure*, cited in the Lyons edition of 1670

MACHIAVELLI, N., 1469–1527 *Il Principe*, published posthumously, 1532.

MARCA, P. DE, 1594–1662, French canonist and bishop *De concordia sacerdotii et imperii, seu de libertatibus ecclesiae Gallicanae*, 1641 first part, 1663 as a whole.

MARIANA, J., 1537–1624, Spanish Jesuit, who from 1574 to his death lived and wrote at the house of his order in Toledo *De rege et regis institutione*, Toledo, 1599, cited in the Frankfort edition of 1611

MATTHIAS, C. (member of a Brandenburg family?) *Collegium politicum*, Giessen, 1611 *Systema politicum*, Giessen, 1618

MEISSNER, B., 1587–1626, professor of theology at Wittenberg *De legibus*, Wittenberg, 1616

MENOCHIUS, J. S., 1576–1655, teacher in the Jesuit College at Milan *Hieropolitica*, cited in the 2nd edition, Cologne, 1626

MILTON, JOHN, 1608–74 *The tenure of kings and magistrates*, 1648–9 *Eiconoclastes* (an answer to *Eikon Basilike*), 1649 *Defensio pro populo Anglicano* (an answer to the *Defensio regia* of Salmasius, *q.v.*), 1650–1 Gierke cites these in the 1848 edition (London) of Milton's *Prose Works*

MOLINA, L., 1535–1601, a Spanish Jesuit, who taught for many years at the Portuguese University of Evora *De justitia et jure*, cited in the Mainz edition of 1614

MOLINAEUS (Dumoulin), C., 1500–66, a famous French teacher of law and legal writer, who was for some time a refugee in Germany, at Tubingen *Commentarii ad Codicem* (Tubingen lectures), printed 1604

OBRECHT, G., 1547–1612, professor of law at Strassburg *De justitia et jure*, no. 1 in *Selectissimae disputationes*, Strassburg, 1599 *Secreta politica*, 1617, cited in the Strassburg edition of 1644.

OLDENDORP, J., 1480–1561, a jurist who was for some time syndic at Lübeck and then professor at Cologne, afterwards settled at Marburg. *Juris naturalis, gentium et civilis isagoge*, Cologne, 1539 Gierke also mentions a work in German, 'Counsels how one may maintain good policy and order in towns and territories', Rostock, 1579 Oldendorp was syndic at Rostock before he went to Lübeck, and this treatise on practical politics, published at Rostock, may have been written originally before he left Rostock in 1534.

OLIZAROVIUS, A A *De Politica hominum societate*, Danzig, 1651. The name suggests a Polish origin (Olizarowski)

OMPHALUS (Omphalius), J , 1500–67, German jurist *De civili politia libri III*, Cologne, 1565

OSSE, M. VON, 1506?–57, jurist and administrator in the Saxon electorate. *Testamentum* (treating of the duties of a sovereign), addressed to the Saxon Elector Parts were printed in 1607 and 1622, but the first complete edition was that of Thomasius, 1717 The 'testament' was a regular genre in the sixteenth and seventeenth centuries

OTTO, D , 1600?–60?, German jurist. *Dissertatio* (in Arumaeus, *q v*) *an mixtus detur reipublicae status Tractatus politicus de majestate imperii et imperantis* (Strassburg, 1623?) *De jure publico Romani imperii*, Jena, 1616 (the first compendium of German public law)

PAURMEISTER (Baurmeister), T VON, 1555–1616, jurist and administrator, and a critic of Bodin *Commentarius rerum politicarum et juridicarum De jurisdictione imp Rom libri II*, 1616

REINKING, D , 1590–1664, jurist and administrator *Tractatus de regimine saeculari et ecclesiastico*, Giessen, 1619

ROSSAEUS (Rose, Guillaume), 1542?–1602, preacher and almoner to Henri III, bishop of Senlis, a violent partisan of the League and opponent of Henri IV *Liber de justa reipublicae christianae in reges impios et haereticos auctoritate*, Paris, 1590 Rossaeus, like Boucher (*q v*), is a Catholic *monarchomachus*

SALAMONIUS, J MARIUS *De Principatu libri VII*, Rome, 1544, cited in the Paris edition of 1578 This is a work which, in the profundity of its thought, deserves to be counted among the classics of the sixteenth century Gierke also cites his Commentary on the *Digest*, Basle, 1530

SALMASIUS (Claude de Saumaise), 1588–1653, French classical scholar, at one time professor at Leyden invited by Prince Charles to write a defence of his father Charles I *Defensio regia pro Carolo I*, November, 1649, cited in the Paris edition of 1651 Milton, on the instruction of the Council of State, replied in his *Defensio pro populo Anglicano*.

SCHONBORNER, G , 1579–1637, German jurist, and administrator in Silesia *Politicorum libri VII*, 1614, cited in the 4th edition, printed at Frankfort, 1628

SELDEN, JOHN, 1584–1654 *De jure naturali et gentium, juxta disciplinam Ebraeorum*, London, 1640 *Mare Clausum*, London, 1635

SOTO, D , 1494–1560, Dominican, teacher at the University of Salamanca *De justitia et jure*, 1556 (cited in the Venice edition of 1602)

STRYK, S , see Bibliography B

SUAREZ, F , 1548–1617, Jesuit, professor of philosophy in Spain, one of the greatest thinkers of his order *Tractatus de legibus ac Deo legislatore*, 1611 (cited in the Antwerp edition of 1613)

TULDEN, T VON, *obiit* 1645, professor at Bois le Duc *De Regimine civili*, cited in the Louvain edition of his works, 1702

VALENTIA, GREGORIUS DE, 1551–1603, Spanish Jesuit, professor of theology at Ingolstadt *Commentarii theologici*, Ingolstadt, 1592

VASQUEZ, F , 1509–66, ecclesiastical writer on natural law *Controversiarum illustrium aliarumque frequentium libri III*, Frankfort, 1572

VICTORIA, F , *obiit* 1546, Dominican *Relectiones tredecim*, Ingolstadt, 1580. An earlier edition, *Relectiones undecim* (*de Potestate Ecclesiae*, etc) had appeared in 1565.

VOETIUS, G., 1593–1680, Dutch minister, and afterwards professor at Utrecht. *Politica ecclesiastica*, Amsterdam, 1663–76, vols. I–IV.

VULTEJUS, H., 1565–1634, jurist and classical scholar, professor of jurisprudence at Marburg. *Jurisprudentiae Romanae a Justiniano compositae libri II*, Marburg, 1590. Gierke also refers to his Commentaries on the *Institutes*.

WERDENHAGEN, J. A., 1581–1652, a German scholar, theologian and professor, from Helmstedt, who lived at Leyden about 1627–33, and wrote there some of his main works, occupied afterwards in affairs at Bremen and Magdeburg, and in the duchy of Brunswick. *Politica generalis, seu introductio universalis in omnes Respublicas*, Amsterdam, 1632.

WINKLER, B., 1579–1648, taught at Leipzig and Basle; afterwards syndic at Lubeck, one of the early writers on natural law *Principiorum juris libri V*, Leipzig, 1615

WINTONENSIS, STEPHANUS (Stephen Gardiner), 1483?–1555, Master of Trinity Hall, Cambridge, 1525–49, and again in 1553, bishop of Winchester, 1531, doctor of civil and of canon law *Oratio de vera oboedientia*, London, 1535 (cited by Gierke from Goldast's *Monarchia* of 1611, I, pp 716–33)

WURMSER . *Exercitationes*

ZEPPER, W. Z., 1550–1607, the first systematic writer on the problems of the constitution of the Protestant churches, professor at Herborn, at the same time as Althusius. *De politia ecclesiastica*, Herborn, 1595.

ZWINGLI, U. Z., 1484–1531. Gierke refers to his Works, as edited by Schuler and Schulthess. See A. Farner's monograph on *Die Lehre von Kirche und Staat bei Zwingli*, 1930

B. LIST OF AUTHORS CITED 1650–1800

ACHENWALL, G A (1719–72) [professor of law in the University of Göttingen, and a student of contemporary comparative politics, who travelled in England and Holland, and was honoured by George III He published, in 1749, an outline of contemporary politics in the greater European monarchies and republics Gierke refers to one of his legal works], *Jus Naturae*, as printed in 1781, when the 7th edition appeared This contains (*a*) *Prolegomena*, 5th edition (first printed in 1758), (*b*) *Pars prior*, 7th edition (first printed in 1750), and (*c*) *Pars posterior*, 8th edition (first printed in 1750)

ALBERTI, V. (1635–97) [Lutheran theologian, and professor at Leipzig], *Compendium juris naturae orthodoxae theologiae conformatum*, Leipzig, 1678 [The work has been described as 'an attempt to interpret natural law as the order prevailing in the original sinless condition of man']

ANDLER, F F VON (1617–1703) [lecturer in law at Wurzburg], *Jurisprudentia qua publica, qua privata*, etc , 1670

BECCARIA, C B (1738–94) [an Italian publicist, of noble family, who became a professor of law and economics in Milan], *Dei delitti e delle pene*, Monaco, 1764

BECKER, O H [sometime *Regierungsrath* in the principality of Waldeck], *Jus mundi seu vindiciae juris naturae*, cited in the 2nd edition, 1698 (first printed in 1690)

BECMANN, J C (1641–1717) [professor at Frankfort on the Oder, who wrote a *Historia orbis terrarum geographica et civilis*, and also historical works about the principality of Anhalt The works to which Gierke refers are his] *Meditationes politicae*, Frankfort, 1679, and his *Conspectus doctrinae politicae*, Frankfort, 1691

BLACKSTONE, Sir W (1723–80), *Commentaries on the Laws of England*, 1765–69

BOECLER, J. H B (1611–72) [professor of history at Strassburg, an elegant Latinist, and a classical scholar as well as an historian and writer on politics The work to which Gierke refers is his] *Institutiones politicae*, Strassburg, 1674.

BOEHMER, J. H , 1674–1749 [professor in the University of Halle, and one of the foremost scholars and jurists of his day, especially in civil and ecclesiastical law. His works on *Jus ecclesiasticum protestantinum* and on *Jus parochiale* exercised a great influence Gierke cites his] *Introductio in jus publicum universale*, in the Prague edition of 1743 (first printed in 1709) [The newly founded University of Halle had a flourishing school of law in the first half of the eighteenth century. see Gundling, Heineccius, Nettelbladt, Thomasius and Wolff *infra*]

BOSSUET, J. B , 1627–1704 [bishop of Meaux] *Politique tirée des propres paroles de l'écriture Sainte*, Paris, 1709 (cited from his *Œuvres complètes*, Tome XVII, Paris, 1826)

CELLARIUS, B [1614–89, preacher and professor of theology at Helmstedt. Besides a theological work, on the controversies between the churches of the Augsburg Confession and the Roman, he wrote *Tabulae ethicae politicae et physicae* The work to which Gierke refers is] *Politica succincta*, Jena, 1658 (cited in the 11th edition, of 1711).

CLASEN, D., *Politicae compendium succinctum*, Helmstedt, 1675 [Clasen also wrote a work *De religione politica*, Magdeburg, 1655 He also wrote on the 'theology' and 'oracles' of the 'Gentiles'—i e of the ancient world]

COCCEJI, H DE, 1644–1719 [a jurist who succeeded to Pufendorf's chair at Heidelberg, but left Heidelberg in 1688, and became professor at Frankfort on the Oder in 1690. He exercised an influence on the study both of natural law and of public law Gierke refers to his] *Prodromus juris gentium*, Frankfort, 1719, and *Hypomnemata juris ad seriem Institutionum Justin* , Frankfort, 1698.

COCCEJI, S DE, 1679–1755 [third son of H. de Cocceji, at first, like his father, a professor at Frankfort on the Oder, but afterwards busily occupied in judicial activities and reforms in Prussia under Frederick William I and Frederick II Gierke refers to three of his writings] *Disputatio de principio juris naturalis unico, vero et adaequato*, Frankfort, 1699 [a 'disputation' for the doctorate, in which he expounded his father's ideas on natural law, as based on the will of God As his father had never published his views, except in lectures, this *Disputatio* first gave them prominence], *Tractatus juris gentium*, Frankfort, 1702, *Novum systema justitiae naturalis et Romanae*, 1740. [The 1740 edition is actually called *Elementa justitiae, etc* the title *Novum systema* is first used in a later reprint of 1744]

CUMBERLAND, R , 1632–1709 [really 1631–1718 Cumberland was a member of Pepys' college, Magdalene, and a friend of Pepys he became bishop of Peterborough in 1691 He published in 1672 his *De legibus naturae disquisitio philosophica*, dedicated to another of his Magdalene friends, one of the great lawyers of the reign of Charles II, Sir Orlando Bridgeman The work is an answer to Hobbes, on utilitarian lines Gierke cites it as] *De legibus naturae*, 2nd edition, printed at Lubeck and Frankfort, 1683 [The book was translated from the Latin by Barbeyrac (for whom see under Pufendorf, *infra*), with notes, 1774]

DARIES, J G , 1714–91 [He became professor of moral and political philosophy at Jena in 1744 From Jena he moved to Frankfort on the Oder in 1763, where he held the chair of law till his death He was a voluminous writer, who published works on metaphysics and ethics as well as on law and politics. Gierke refers to his] *Institutiones jurisprudentiae universalis*, cited in the 7th edition, Jena, 1776 (first published in 1746)

EHRENBACH, J N. MYLER AB, 1610–77 [a man of affairs, as well as a student of politics, who played a considerable part in his time He was deeply versed in the public law of the Empire In 1656 he had published an *Outline of the main rights of the Princes and States of the Empire*, which attained great vogue Later, he planned a larger work, in a number of parts, under the title of *Opus de jure publico imperii Romano-Germanici* The work to which Gierke refers is the 7th part of this *opus*, dealing with officials, magistrates and their assistants, under the title of] *Hyparchologia*, Stuttgart, 1678

FELDE, JOHANNES A [a critic of Grotius, and also the writer of a *tractatus de peste*], *Elementa juris universi et in specie juris publici Justinianei*, Frankfort and Leipzig, 1664.

FELWINGER, J P. [? professor at Altdorf c 1650–75 acted as *praeses* at disputations on politics, in the fashion of the day], *Dissertationes politicae*, Altdorf, 1666

FÉNELON, F DE SALIGNAC DE LAMOTTE, 1651–1715 [tutor to the Dauphin under Louis XIV, and afterwards archbishop of Cambrai Gierke refers to an] *Essai sur le gouvernement civil, selon les principes de Fénelon*, 3rd edition, by

A. M. Ramsay, London, 1723 [Fénelon's own writings are the *Télémaque* o 1699, and the *Dialogues des morts, composés pour l'éducation d'un prince*, first published in 1712, and republished in an enlarged edition by Ramsay in 1718]

FERGUSON, ADAM, 1723–1816 [professor, first of natural philosophy, and afterwards of moral philosophy, at Edinburgh]. *Essay on Civil Society*, 1766, *Principles of Moral and Political Science*, ['being chiefly a retrospect of lectures delivered in the College of Edinburgh'], 1792

FICHTE, J G, 1762–1814 [professor of philosophy at Jena, 1794–1799, dismissed for his views, after its foundation in 1810, Rector in 1811–12 of the University of Berlin] Gierke refers to

I. Fichte's *Collected Works*, in the Berlin edition of 1845–6, and therein to the following works
   (*a*) *Contributions to the justification of the opinion of the Public on the French Revolution*, 1793 (*Works*, VI, pp 103 sqq);
   (*b*) *Foundations of Natural Law according to the principles of Scientific Theory*, published in 1796–7, at Jena and Leipzig (*Works*, III, pp 1 sq),
   (*c*) *A System of Ethical Theory according to the Principles of Scientific Theory*, 1798 (*Works*, IV, pp 1 sqq),
   (*d*) *The Self-contained Commercial State* [*Der geschlossene Handelstaat*], published in 1800 at Tubingen (*Works*, III, pp 387 sqq),
   (*e*) *The Foundations of the Present Age*, lectures delivered in 1804–5, published at Berlin in 1808 (*Works*, VII, pp 257 sqq),
   (*f*) *The Theory of the State, or the Relation of the Primitive State to the Law of Reason*, lectures delivered in 1813, first published at Berlin in 1820 (*Works*, VII, pp. 367 sqq)

II. *Posthumous Works*, published in Berlin, 1834, especially the work entitled *A System of Jurisprudence*, lectures delivered in 1812 (in II, pp. 493 sqq).

FILANGIERI, G, 1762–86 [an Italian publicist, of noble Neapolitan family, who continued the work of the school of legal and political philosophy at Naples inspired by Vico] *La scienza della legislazione*, Naples, 1780

FILMER, Sir R [*circ.* 1588–1653, a Kentish Royalist who published in 1648 *The Anarchy of a Limited or Mixed Monarchy*, attacking the theory of Philip Hunton's *Treatise of Monarchy* of 1643, along with the writings of Grotius, Hobbes and Milton It is curious, in this connection, to notice (1) that Locke seems to owe some of his theory to Hunton, and (2) that Locke, very naturally, seeks to prepare the way for his own theory, in the *Second Treatise*, by attacking Filmer in the *First* Gierke refers to the work by which Filmer is best known], *Patriarcha*, published posthumously in 1680

FREDERICK II [King of Prussia], 1712–86 [Gierke refers to three of his writings]
   (*a*) *Considérations sur l'état présent du corps politique de l'Europe*, 1738 (*Œuvres* VIII, pp. 1 sqq);
   (*b*) *Antimachiavelli*, 1739, edited by Voltaire 1740 (*Ibid* VIII, pp 59 sqq),
   (*c*) *Essai sur les formes du gouvernement et sur les devoirs des Souverains*, 1777 (*Ibid* IX, pp 195 sqq)

GUNDLING, N H., 1671–1729 [the son of a clergyman, trained for the Church, who turned to law under the influence of Thomasius, and became ultimately professor of natural and international law at Halle He wrote a great number of dissertations and compendia—partly, it is said, to escape from the distractions of an unhappy marriage. Gierke refers to]

(*a*) *Jus naturae et gentium*, as printed in the 2nd edition (Halle and Magdeburg, 1728· the 1st edition had appeared in 1714),
(*b*) A *Discursus* on natural and international law [published posthumously, as many of his *Discursus* were], Frankfort, 1734,
(*c*) *Exercitationes academicae*, more especially.
(1) *Exerc* IV, pp 155 sqq (entitled *Status naturalis Hobbesii in corpore juris civilis defensus et defendendus*, and belonging to the year 1706),
(2) *Exerc* XVI, pp 829 sqq (*De universitate delinquente ejusque poenis*, 1724).

HEINCKE, F. J, *Systema juris publici universalis*, 1765. [This is the only information which Gierke gives The *Allgemeine Deutsche Biographie* gives an account of F J. Heinke (1726–1803), a Silesian who studied at Prague, where he became director and President of the Law Faculty—eventually entering the service of the government in Vienna in 1767 But the *Biographie* does not mention any *Systema juris* as having been published by him]

HEINECCIUS, J G, 1681–1741 [professor of law at Halle, and elsewhere, and one of the greatest of the German jurists of the eighteenth century. Gierke refers to three of his works]·
(1) *Elementa juris naturae et gentium*, first published in 1737 (printed in vol 3 of *Opera omnia*, Geneva, 1741 onwards),
(2) *Praelectiones academicae in Hugonis Grotii de jure belli et pacis libros*, published in 1744 (*Opera omnia*, VIII, 1),
(3) *Praelectiones academicae in S Pufendorfii de officio hominis et civis libros*, 2nd edition, 1748

HERDER, J G., 1744–1803 [German critic, man of letters, and collector of *Volkslieder* Gierke refers to his] *Ideen zur Geschichte der Menschheit*, 1784–5 (in his *Collected Works in Philosophy and History*, vols IV–VII).

HERTIUS, J N, 1652–1710 [one of the leading jurists of Germany in the seventeenth century, and professor of law at Giessen Gierke refers to]
(*a*) *Elementa prudentiae civilis*, 1689 (cited in the 2nd edition, Frankfort on the Main, 1702),
(*b*) *Commentationum atque opusculorum vol II*, as published in 1737, at Frankfort on the Main (the items had been first published in 1700 and 1716)

HOFFBAUER, J C [1766–1827, professor of philosophy at Halle], *Naturrecht aus dem Begriffe des Rechts entwickelt*, 1793 (cited in the 3rd edition, Halle, 1803)

HORNIUS, J F, 1620–70? [not mentioned in the German or Dutch National Biographies Gierke refers to two works] *De subjecto juris naturalis*, Utrecht, 1663, *Politicorum pars architectonica*, Utrecht, 1664 [reprinted as *Architectonica de Civitate*, with notes by S Kuchenbecher, Leyden, 1699]

HUBER, U, 1636–94 [a Dutch jurist of eminence, professor at Franeker in Friesland]
(1) *De jure civitatis*, 1674 (cited in the Franeker edition of 1713),
(2) *Praelectionum juris civilis tomi III*, 1666 (cited in the Leipzig edition of 1735),
(3) *Institutiones juris publici*, in *Opera minora*, I, 1 (the Utrecht edition of 1746)

HUMBOLDT, W. VON, 1767–1835 [thinker and statesman, Prussian minister of education, 1809–10]·
(1) *Ideas for an essay on the limits of the activity of the State*, 1792
Parts printed in *Thalia* [Schiller's Leipzig magazine], 1792, and in the *Berlin Monthly*, 1792, published complete, Breslau, 1851.

HUME, D, 1711–76 [*Essays Moral and Political*, 1741–2 Gierke refers to the edition of the] *Political Essays*, translated into German by C. J Kraus, Königsberg, 1813

ICKSTATT, S A., 1702–76 [a jurist in the Bavarian service, for some time professor, at Ingolstadt, of public and international law and the law of nature, under the style of *jus oeconomicocamerale*], *Opuscula juridica varii argumenti*, vol I, Ingolstadt and Augsburg, 1747, vol II, Munich and Ingolstadt, 1759

JENA, G VON, 1620–1703 [a jurist in the service of the Great Elector and his successor, for some time professor at Frankfort on the Oder], *Collegium juris publici*, Frankfort on the Main, 1658 (it also appeared as *Fragmenta de ratione status*, 1657) [A series of dissertations]

JUSTI, J. H. G VON, 1720–71 [professor at Vienna of 'applied politics', afterwards in the Prussian service]

(1) The *Foundations of a good government*, in five books, Frankfort and Leipzig, 1759,

(2) The *Nature and Being of States*, Berlin, Stettin and Leipzig, 1760

[The work on applied politics for which Justi was best known was entitled, *The Bases of the power and prosperity of States, or a detailed account of the whole science of policy* (*Polizeiwissenschaft*), of which vol I appeared in 1760, and vol II in 1761 But this was only one of a considerable number of political writings—among them the two which Gierke cites. Justi had a varied and wandering career, which led him incidentally into the management of mines, but he found time to write a great number of books, and his friends called him the Buffon of Germany]

KANT, I, 1724–1804 [professor of logic at Königsberg] *Collected Works*, in chronological order, edited by G Hartenstein, Leipzig, and especially

(1) *On the saying, 'That may be right in theory, but it has no value in practice'*, 1793 (*Works*, VI, pp 303 sqq),

(2) *Perpetual Peace*, 1795 (*Ibid* VI, pp 405 sqq),

(3) *Metaphysic of Morality* (*Ibid* VII, pp 1 sqq), containing the 'Metaphysical Elements of Jurisprudence', and the 'Metaphysical Elements of Ethics', which appeared separately in 1797 and were put together in one volume in 1798

[In English, see T K Abbott, *Kant's Critique of Practical Reason, and other works on the theory of Ethics*]

KESTNER, H E, 1671–1723 [professor of law at Rinteln, near Minden]

(1) *Jus naturae et gentium, ex ipsis fontibus ad ductum Grotii Pufendorfii et Cocceji derivatum*, Rinteln, 1705,

(2) *Compendium juris universi*, Rinteln, 1707

KLEIN, E. F, 1744–1816 [a jurist who took a considerable part in the development of Prussian law towards 1800, and also lectured at the University of Halle, 1791–1801], *Short Essays*, Halle, 1797 (the Essay 'On the nature of civil Society' is in II, pp 55 sqq)

KNICHEN, R G [died in 1682, was the son of A Knichen, who had been a professor of law, and had defended the cause of the territorial princes against the towns He wrote] *Opus politicum*, Frankfort on the Main, 1682.

KREITTMAYR, W X. A VON, 1705–90 [Bavarian State-Chancellor, and codifier of the law of Bavaria], *Outline of general and of German public law*, Munich, 1770

KULPIS, J G., 1652–98 [professor of public institutions and public law at Strass-

burg, 1683–6, afterwards in government service in Würtemberg], *Dissertationes academicae*, Strassburg, 1705

LEIBNIZ, G W., 1646–1716.

A *Opera omnia*, ed Dutens, Geneva, 1763—the various essays on law and politics, in IV, 3, pp 159 sqq , including:

(1) *Nova methodus discendae docendaeque jurisprudentiae*, 1667;

(2) *Observationes de principio juris*, 1670;

(3) *Monita quaedam ad S Pufendorfii principia*,

(4) *De suo codice gentium diplomatico monita*;

(5) *Caesarini-Furstenerii tractatus de jure suprematus ac legationum Principum Germaniae*, 2nd edition, 1678,

(6) *Specimen demonstrationum politicarum pro eligendo Rege Polonorum*

B *German Writings*, edited by Guhrauer, 1838–40—the 'Fragment on the Law of Nature' in I, pp. 414 sqq

LOCKE, JOHN, 1632–1704.

(1) *Two treatises on Government*, London, 1690,

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PRASCHIUS, J L, 1637–90 [a citizen of Ratisbon, where he held high office and was deep in all civic affairs philologist, writer of verse, and dramatist, as well as a writer on laws and politics], *Designatio juris naturalis ex disciplina Christianorum*, Ratisbon, 1688

PUFENDORF, S, 1632–94 [publicist, jurist, and historian taught at the university of Heidelberg, 1661–8 professor in Lund, on the invitation of Charles XI of Sweden, 1670 onwards historiographer at Stockholm in 1677, and at Berlin in 1688 one of the greatest scholars of his century, and one of the greatest figures in the history of natural law]

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* Cf Caesarinus-Furstenerius above, under Leibniz

[Barbeyrac (1674–1729), a Huguenot who taught in Berlin, Lausanne and Groningen, translated into French, and annotated, not only (3) and (4) above, but also Grotius *De jure belli et pacis*]

[Pufendorf's *De habitu religionis Christianae ad vitam civilem liber singularis*, 1687, may also be mentioned, as dealing with the relations of Church and State and the problem of toleration at a time when the Revocation of the Edict of Nantes had disturbed men's minds. It is almost contemporary with Locke's *Letter on Toleration*, which deals with the same problems in the same atmosphere.]

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SCHLÖZER, A. L. VON, 1735–1809 [travelled in Sweden and Russia. professor at Gottingen publicist, historian and educationalist, who, *inter alia*, continued the work of Achenwall on contemporary politics and institutions in his *Theorie der Statistik* of 1804. Gierke refers to his] *General Public Law and the Theory of Constitutions*, Gottingen, 1793

SCHLOZER, C. VON [1774–1831. eldest son of the foregoing, professor of the political sciences at Moscow, *circ* 1790–1827, lecturer at Bonn, 1828–31], *Kleine Schriften*, Gottingen, 1807, especially

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[His chief importance perhaps lies in the field of political economy. He published at Riga in 1805 and 1807 two volumes on *The Principles of Political Economy or the Theory of National Wealth*]

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[STRYK, S., 1640–1710, professor at Frankfort on the Oder and afterwards, from 1692 to his death, at Halle, where he was also dean of the Faculty of Law and Rector of the University. His chief work was his *Usus modernus Pandectarum*. Gierke refers *passim* to his *Dissertationes*.]

THOMASIUS, C., 1655–1728 [professor at Leipzig and afterwards at Halle a philosopher and a man of general culture as well as a famous jurist, who advocated the use of German instead of Latin, and attacked Aristotle and scholasticism. His name is connected with the beginnings of the University of Halle, and with its legal fame].

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TITIUS, G. G., 1661–1714 [lectured at Leipzig on law from 1688, but did not become Professor until 1710. a pupil of Thomasius].

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WOLFF, C., 1679–1754 [philosopher, mathematician and jurist. professor of Mathematics and Natural Philosophy at Halle, 1706–23, after troubles there, professor at Marburg, but restored to Halle by the action of Frederick the Great in 1740 as professor of *jus naturae et gentium*, a friend of Leibniz, and one of the great figures in the history of German philosophy. Gierke refers to his]

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